



July 28, 2016

High Performance Transportation Enterprise
4201 East Arkansas Ave., Room 230
Denver, CO 80222

Colorado Bridge Enterprise
4201 East Arkansas Ave., Room 230
Denver, CO 80222

RE: CENTRAL 70 PROJECT; RFP ADDENDUM NO. 4

Dear Proposer,

We refer to the Request for Proposals to Design, Build, Finance, Operate and Maintain the Central 70 Project issued September 15, 2015, and September 29, 2015 (as amended December 23, 2015, by Addendum No. 1, February 23, 2016, by Addendum No. 2 and June 14, 2016, by Addendum No. 3 the “RFP”). Capitalized terms used but not defined herein have the meanings given to them in the RFP.

This letter, together with the documents attached to it (except the comparison document) constitutes Addendum No. 4 to the RFP (“**Addendum No. 4**”). This Addendum No. 4 modifies the RFP pursuant to Section 1.3.1 of Part C of the ITP.

Attached hereto are the following documents, each of which hereby replaces in its entirety the corresponding document (or, as applicable, relevant part thereof) included in the RFP immediately prior to the date of this letter.

Project Agreement Schedules:

1. Schedule 2 (Representations and Warranties)
2. Part A (Form of Enterprises’ Legal Opinion) of Schedule 19 (Forms of Direct Agreements)¹
3. Schedule 22 (Forms of Legal Opinions)

Schedule 19 is accompanied by a comparison document showing changes made since the most recent prior release of such document; such comparison is provided for your convenience only and does not constitute part of the RFP.

Proposers are encouraged to submit any RFP Comments with respect to Addendum No. 4 on or before 9:00 am (Denver, Colorado time) on Thursday, August 4, 2016. Such date and time shall be deemed to be an RFP Comment Deadline for purposes of Section 2.2 of Part C of the ITP as it applies to this Addendum No. 4.

Please also note that:

- Schedule 19, as revised, reflects the Enterprises’ consideration of Proposer comments received by the Enterprises in response to both Addendum No. 2 and Addendum No. 3, as well as comments received from TIFIA.
- A complete draft of Schedule 25 (Dispute Resolution Procedures) will be released in a future Addendum.
- Addendum No. 4 is simultaneously being released to each Proposer through the Secure Project DMS. A public release version will also be made available to all other interested parties through the Project website at: central70.codot.gov.

¹ For certainty, Part B (Form of Developer Legal Opinion of Schedule 22 (Forms of Legal Opinions) is not amended or replaced by this Addendum No. 4.

Further, in advance of our forthcoming August one-on-one meeting, we wanted to make you aware of the following changes that we have already decided to make to the Supervening Event regime in the Project Agreement.

The following events will now be included in the definition of "Compensation Events":

- (1) discovery of any Unexpected Historically Significant Remains (current Relief Event a.iii.A.);
- (2) discovery of any Unexpected Endangered Species (current Relief Event a.iii.B.); and
- (3) the issuance of any temporary restraining order etc. (current Relief Event a.iv).

These adjustments will be reflected in a future Addendum.

Please also note that we are continuing to consider your remaining comments on the Project Agreement and ITP and expect to discuss those with you in your August meeting and, to the extent appropriate, respond to them through the issuance of a future Addendum in line with prior practice.

Except as expressly modified by this Addendum No. 4, the RFP for the Central 70 Project otherwise remains unchanged.

Sincerely,

A handwritten signature in black ink, appearing to read "Nicholas Farber". The signature is fluid and cursive, with the first name "Nicholas" written in a larger, more prominent script than the last name "Farber".

Nicholas Farber
Designated Representative
Colorado Bridge Enterprise
High Performance Transportation Enterprise

Schedule 2
Representations and Warranties¹

Part A: Representations and Warranties of Developer

- (a) **Organization; Power and Authority.** Developer:
- (i) is a [*type of organization*], duly [incorporated] [organized], validly existing and[, where legally applicable,] in good standing in accordance with the laws of [];
 - (ii) is authorized to transact business in, and is registered with the Secretary of State in, the State; and
 - (iii) has the [corporate] power and authority to:
 - (A) transact the business that it transacts and proposes to transact pursuant to the Project Agreement; and
 - (B) execute, deliver and perform each of the Project Agreement, each Principal Subcontract and each other Subcontract to which Developer is a party, each Financing Document and each Enterprise Closing Agreement to which it is a party (collectively, the "Developer Agreements").
- (b) **Authorization and Due Execution.**
- (i) Each Person executing any Developer Agreement on behalf of Developer has been (or, at the time of execution, will have been) duly authorized to execute and deliver such document on behalf of Developer.
 - (ii) The execution, delivery and performance of each Developer Agreement by Developer has otherwise been duly authorized by all necessary [corporate] action of Developer.
 - (iii) Each Developer Agreement has been (or at the time of execution and delivery will have been) duly and validly executed and delivered by Developer.
- (c) **Enforceability.** Each Developer Agreement constitutes (or at the time of execution and delivery will constitute) a legal, valid and binding obligation of Developer, enforceable against Developer and, if applicable, each Equity Member holding an interest in Developer, in accordance with its terms, subject only to applicable bankruptcy, insolvency and similar laws affecting the enforceability of the rights of creditors generally and general principles of equity.
- (d) **No Conflicts.** The execution, delivery and performance by Developer of any Developer Agreement does not and will not contravene any:
- (i) Law applicable to Developer that is in effect on the date of execution and delivery of each Developer Agreement;
 - (ii) organizational, corporate or other governing documents of Developer;
 - (iii) agreement, judgment or decree to which Developer is a party or is bound; or
 - (iv) other obligation that is binding on Developer.
- (e) **Consents and Approvals.**
- (i) Prior to the Agreement Date, Developer familiarized itself with the requirements of any and all Law, including Laws applicable to the use of Federal funds, and the conditions of any Governmental Approvals or Permits necessary to perform its obligations under the Project Agreement at the time and in the manner required.
 - (ii) Developer, as of the date on which this representation and warranty is given or repeated, has acquired any and all such Governmental Approvals and Permits necessary to

¹ This Schedule will be revised prior to execution of the Project Agreement, to the extent appropriate, to reflect Developer's final legal form and any relevant aspects of its Subcontracting arrangements.

perform its obligations under the Project Agreement that fall due for performance immediately on or following such date, which Governmental Approvals and Permits are required to be obtained by Developer pursuant to the Project Agreement, and, as of such date, all such Governmental Approvals and Permits are in full force and effect.

- (iii) Developer has no reason to believe that any such Governmental Approval or Permit required to be obtained by Developer pursuant to the Project Agreement will not be granted in due course and thereafter remain in effect so as to enable the Work to proceed in accordance with the Project Agreement.
- (f) **Developer Default.** No Developer Default has occurred and is continuing, and no fact or event exists that with the passage of time or giving of notice would constitute a Developer Default.
- (g) **Applicable Law.** Developer is not in breach of any Law that would have a material adverse effect on the Work or the performance of any of its obligations under the Developer Agreements.
- (h) **Registrations, Permits and Licenses.**
 - (i) All Work to be performed (directly or indirectly) by Developer will be performed:
 - (A) by or under the supervision of Persons who hold all necessary or required registrations, permits or approvals to perform the relevant part of the Work and valid licenses to practice in the State; and
 - (B) by personnel who are professionally qualified to perform the Work in accordance with the Developer Agreements.
 - (ii) Developer and the Principal Subcontractors have maintained and complied with, and throughout the term of this Agreement will maintain and comply with, all required authority, license status, applicable licensing standards, certification standards, accrediting standards, professional ability, skills and capacity to perform the Work.
- (i) **Due Diligence; Reasonable Investigation.**
 - (i) The statements set out in Sections 3.1.a, 3.1.b and 3.2.1 of the Project Agreement are true and accurate.
 - (ii) On the basis of:
 - (A) the due diligence conducted by the Preferred Proposer and the Developer-Related Entities as referred to in Sections 3.1.b and 3.2.1 of the Project Agreement; and
 - (B) the subsequent such diligence of the Project, the Project Information and the Site as has been conducted by Developer:
 - (I) Developer is familiar with and accepts the physical requirements of the Work, has evaluated all the constraints affecting design and construction of the Project and has reasonable grounds for believing and believes that the Project can be designed and built within such constraints; and
 - (II) Developer has obtained for itself all necessary information regarding the risks, contingencies and other circumstances which may influence or affect Developer's ability to perform its obligations under the Project Agreement and any other factors which would affect its decision to enter the Project Agreement or the terms on which it would do so.
- (j) **Financial Model.**
 - (i) The Financial Model:
 - (A) was prepared by or on behalf of Developer in good faith;
 - (B) was audited and verified by an independent recognized model auditor immediately before the Agreement Date;

- (C) fully discloses all financial assumptions and projections that Developer has used or is using in making its decision to enter into this Agreement and in making disclosures to rating agencies, potential equity investors and Lenders;
 - (D) includes only formulas that are:
 - (I) mathematically correct and suitable for making the projections referred to in Section (j)(i)(E) of this Part A, and
 - (II) the same financial formulas that Developer utilized and is utilizing in the Financial Model in making its decision to enter into the Project Agreement and in making disclosures to rating agencies, potential equity investors and Lenders; and
 - (E) represents the projections that Developer believes in good faith are the most realistic and reasonable for the Project as of the date on which this representation and warranty is given or repeated, provided that such projections:
 - (I) are based upon a number of estimates and assumptions;
 - (II) are subject to significant business, economic and competitive uncertainties and contingencies; and
 - (III) accordingly, are not a representation or warranty that any of the assumptions are correct, that such projections will be achieved or that the forward-looking statements expressed in such projections will correspond to actual results.
 - (ii) Developer has reviewed all Law relating to Taxes, and has taken into account all requirements imposed by relevant Law in preparing the Financial Model.
- (k) **Legal Proceedings.** There is no:
- (i) action, suit, proceeding, investigation or litigation pending and served on Developer or the Equity Members that:
 - (A) challenges Developer's authority to execute, deliver or perform any Developer Agreement;
 - (B) challenges the validity or enforceability of any Developer Agreement;
 - (C) challenges the authority of any Developer representative executing any Developer Agreement; and/or
 - (D) could have a material and adverse effect on the ability of Developer to perform its obligations under any Developer Agreement and/or on the ability of either Enterprise to exercise any of its rights under any Developer Agreement to which it is a party;
 - (ii) un-served or threatened action, suit, proceeding, investigation or litigation with respect to any of the matters referred to in Sections (k)(i)(A) to (D) of this Part A of which Developer is aware; and
 - (iii) current, pending or outstanding criminal, civil, or enforcement action initiated by the Enterprises, CDOT, the State or any other Governmental Authority against Developer, and Developer agrees that it will immediately notify the Enterprises of any such actions.
- (l) **Prohibited Acts.** Developer has not, and, to the best of Developer's knowledge and belief (Developer having made reasonable enquiries with a view to obtaining such knowledge and belief) no Developer-Related Entity has, committed any Prohibited Act.
- (m) **Organizational Conflicts of Interest.** As of the date of the [*Preferred Proposer's Financial Proposal Submission*], the Preferred Proposer disclosed to the Enterprises in writing all Organizational Conflicts of Interest of which Preferred Proposer was aware and, since such date,

Developer has not obtained knowledge (Developer having made reasonable inquiries with a view to obtaining such knowledge) of any additional Organizational Conflict of Interest, and there have been no Organizational Changes or Key Personnel Changes (as such terms are defined in the ITP) to or by Developer or its Principal Subcontractors identified in its Proposal which require approval by the Enterprises pursuant to the terms of the ITP and have not been so approved.

- (n) **Debarment.** None of Developer, any of its principals or any of its Principal Subcontractors are presently disqualified, suspended or debarred from bidding, proposing or contracting with any state-level, interstate or Federal Governmental Authority. For purposes of this representation and warranty, the term "principal" means an officer, director, Equity Member or other direct or indirect owner, partner, Key Personnel, employee or other person with primary management or supervisory responsibilities, or a person who has a critical influence on or substantive control over the operations of Developer.
- (o) **Taxes and Fees.** Neither Developer nor any of its Equity Members² is presently in arrears in payment of Taxes, Permit fees or other statutory, regulatory or judicially required payments to any Governmental Authority.
- (p) **Principal Subcontractors.** As of the effective date of the relevant Principal Subcontract:
- (i) each of the Construction Contractor [and the O&M Contractor]³ (and, if the Construction Contractor [or the O&M Contractor] is a joint venture, each member thereof) (each such Principal Subcontractor and each such member, a "Relevant Entity") is duly organized, validly existing and, where legally applicable, in good standing under the laws of the state of its organization;
 - (ii) each Relevant Entity has the power and authority to do all acts and things and execute and deliver all other documents as are required to be done, observed or performed by it in connection with its engagement by Developer;
 - (iii) each Relevant Entity has:
 - (A) obtained or will obtain and will maintain all necessary or required registrations, permits, licenses and approvals required under applicable Law; and
 - (B) expertise, qualifications, experience, competence, skills and know-how to perform the Construction Work and O&M Work as applicable, in accordance with this Agreement;
 - (iv) each Relevant Entity will comply with all health, safety and environmental Laws in the performance of any work activities for, or on behalf of, Developer;
 - (v) none of the Relevant Entities is in breach of any applicable Law that would have a material adverse effect on the Construction Work and/or the O&M Work, as applicable; and
 - (vi) each Principal Subcontract, and any amendments or supplements thereto, is in compliance with, and, as applicable, incorporates the terms set out in, Part A of Schedule 16 to the Project Agreement.

² **Note to Proposers:** Subject to adjustment to account for the Preferred Proposer's equity structure (e.g., the use of a HoldCo).

³ **Note to Proposers:** To be deleted if Developer is to self-perform O&M Work.

Part B: Representations and Warranties of the Colorado Bridge Enterprise⁴

- (a) **Power and Authority.** BE is a government-owned business within CDOT and BE has or (with respect to those BE Agreements to which HPTE is also a party) the Enterprises have the legal power, right and authority to execute, deliver and perform the Project Agreement, the Enterprise Closing Agreements to which BE is a party and the IAA (collectively, the "BE Agreements"), subject to the terms and conditions of each BE Agreement.
- (b) **Authorization and Due Execution.**
 - (i) Each person executing any BE Agreement on behalf of BE has been (or, at the time of execution, will have been) duly authorized to execute and deliver such BE Agreement on behalf of BE.
 - (ii) The execution, delivery and performance of each BE Agreement has otherwise been duly authorized by BE.
 - (iii) Each BE Agreement has been (or will be) duly and validly executed and delivered by BE.
- (c) **Enforceability.** Each BE Agreement constitutes (or at the time of execution and delivery will constitute) a legal, valid and binding obligation of BE or (with respect to those BE Agreements to which HPTE is also a party) of the Enterprises enforceable against it or them, respectively, in accordance with its terms, except to the extent limited by applicable bankruptcy, insolvency, reorganization, moratorium or other similar laws affecting the enforceability of the rights of creditors generally, by general principles of equity, by the exercise by the State and its governmental bodies of the police power inherent in the sovereignty of the State and by the exercise by the United States of the powers delegated to it by the Constitution of the United States.
- (d) **No Conflicts.** The execution and delivery by BE of the BE Agreements has not resulted in, and the performance thereof by BE will not result in:
 - (i) a default under or a violation of any agreement, judgment or decree to which BE is a party or is bound; or
 - (ii) a violation of any Law applicable to BE that is in effect on the date of execution and delivery of each BE Agreement.
- (e) **Consents and Approvals.** As of the date on which this representation and warranty is given or repeated, no consent of any party and no Governmental Approval which has not already been obtained is required, as of such date, to have been obtained in connection with the execution, delivery and performance of any BE Agreement by BE.
- (f) **Enterprise Default.** No Enterprise Default has occurred and is continuing, and no fact or event exists that with the passage of time or giving of notice would constitute an Enterprise Default.
- (g) **Applicable Laws.** BE is not in breach of any Law that would have a material adverse effect on the performance of any of its obligations under any BE Agreement.
- (h) **Legal Proceedings.** Except as disclosed in writing by the Enterprises to Developer, no action, suit, proceeding, investigation or litigation is pending or overtly threatened in writing that challenges:
 - (i) BE's authority to execute, deliver or perform;
 - (ii) the legality, validity or enforceability of, as against BE; or
 - (iii) the authority of any representative of BE executing,in the case of (i), (ii) and (iii), any of the BE Documents.

⁴ **Note for Proposers:** Parts B and C of this Schedule remain under internal review by the Enterprises and therefore are subject to amendment.

(i) **Eligible Project Costs.**

- (i) To the best of BE's knowledge, the total federal assistance received and/or allocated and/or to be received and/or allocated by or to the Enterprises for the construction costs of the Project (specifically excluding costs for O&M Work) does not exceed 80% of "eligible project costs", as those costs are defined by any federal loan or grant agreement to which BE is a party or of which BE has actual knowledge.
- (ii) The Enterprises have submitted to TIFIA JPO information regarding all "eligible project costs" incurred to date by the Enterprises.

Part C: Representations and Warranties of the High Performance Transportation Enterprise

- (a) **Power and Authority.** HPTE is a government-owned business within CDOT and HPTE has or (with respect to those HPTE Agreements to which BE is also a party) the Enterprises have the legal power, right and authority to execute, deliver and perform the Project Agreement, the Enterprise Closing Agreements to which HPTE is a party and the IAA (collectively the "HPTE Agreements"), subject to the terms and conditions of each HPTE Agreement.
- (b) **Authorization and Due Execution.**
- (i) Each person executing any HPTE Agreement on behalf of HPTE has been (or, at the time of execution, will have been) duly authorized to execute and deliver such HPTE Agreement on behalf of HPTE.
 - (ii) The execution, delivery and performance of each HPTE Agreement has otherwise been duly authorized by HPTE.
 - (iii) Each HPTE Agreement has been (or will be) duly and validly executed and delivered by HPTE.
- (c) **Enforceability.** Each HPTE Agreement constitutes (or at the time of execution and delivery will constitute) a legal, valid and binding obligation of HPTE or (with respect to those BE Agreements to which BE is also a party) of the Enterprises, enforceable against it or them, respectively, in accordance with its terms, except to the extent limited by applicable bankruptcy, insolvency, reorganization, moratorium or other similar laws affecting the enforceability of the rights of creditors generally, by general principles of equity, by the exercise by the State and its governmental bodies of the police power inherent in the sovereignty of the State and by the exercise by the United States of the powers delegated to it by the Constitution of the United States.
- (d) **No Conflicts.** The execution and delivery by the HPTE of the HPTE Agreements has not resulted in, and the performance thereof by HPTE will not result in:
- (i) a default under or a violation of any agreement, judgment or decree to which HPTE is a party or is bound; or
 - (ii) a violation of any Law applicable to HPTE that is in effect on the date of execution and delivery of each HPTE Agreement.
- (e) **Consents and Approvals.** As of the date on which this representation and warranty is given or repeated, no consent of any party and no Governmental Approval which has not already been obtained is required, as of such date, to have been obtained in connection with the execution, delivery and performance of any HPTE Agreement by HPTE.
- (f) **Enterprise Default.** No Enterprise Default has occurred and is continuing, and no fact or event exists that with the passage of time or giving of notice would constitute an Enterprise Default.
- (g) **Applicable Laws.** HPTE is not in breach of any Law that would have a material adverse effect on the performance of any of its obligations under any HPTE Agreement.
- (h) **Legal Proceedings.** Except as disclosed in writing by the Enterprises to Developer, no action, suit, proceeding, investigation or litigation is pending or overtly threatened in writing that challenges:
- (i) HPTE's authority to execute, deliver or perform;
 - (ii) the legality, validity or enforceability of, as against HPTE; or
 - (iii) the authority of any representative of HPTE executing,
- in the case of (i), (ii) and (iii), any of the HPTE Documents.

(i) **Eligible Project Costs.**

- (i) To the best of HPTE's knowledge, the total federal assistance received and/or allocated and/or to be received and/or allocated by or to the Enterprises for the construction costs of the Project (specifically excluding costs for O&M Work) does not exceed 80% of "eligible project costs", as those costs are defined by any federal loan or grant agreement to which HPTE is a party or of which HPTE has actual knowledge.
- (ii) The Enterprises have submitted to TIFIA JPO information regarding all "eligible project costs" incurred to date by the Enterprises.

Schedule 19
Forms of Direct Agreements

Part A: Form of Lenders Direct Agreement

This Direct Agreement (this "Agreement") is dated as of [] and made among:

- (1) Colorado High Performance Transportation Enterprise ("HPTE"), a government-owned business within, and a division of, the Colorado Department of Transportation ("CDOT");
- (2) Colorado Bridge Enterprise, a government-owned business within CDOT ("BE" and, together with HPTE, each individually an "Enterprise" and, together, the "Enterprises");
- (3) [], a [*describe type of legal entity and reference state of incorporation/organization*] ("Developer"); and
- (4) [] as collateral agent (the "Collateral Agent") for the benefit of the Lenders (as defined below).

RECITALS

Whereas:

- (A) The Enterprises and Developer have entered into a Project Agreement for the Central 70 Project dated as of [] (as the same may be amended, modified or supplemented from time to time in accordance with its terms, the "Project Agreement"), in connection with the design, construction, financing, operation and maintenance of a portion of the I-70 East corridor in Greater Denver (the "Project") as more fully described in the Project Agreement.
- (B) Pursuant to the Financing Documents listed in Annex A, the Collateral Agent is the agent for the various providers of Project Debt to Developer (collectively, the "Lenders"), the proceeds of which will be used by Developer to finance the Project.
- (C) It is a condition precedent to both Financial Close under Schedule 1 (*Financial Close*) to the Project Agreement and to closing and funding of the Project Debt under the Financing Documents that the parties hereto execute this Agreement.

Now, therefore, in consideration of their mutual undertakings and agreements hereunder, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties undertake and agree as follows:

1. DEFINITIONS, INTERPRETATION AND RELATIONSHIP TO PROJECT AGREEMENT

1.1 Definitions

- (a) Capitalized terms used but not defined in this Agreement shall have the meanings given to them in Part A of Annex A (*Definitions and Abbreviations*) of the Project Agreement. For certainty, uncapitalized terms used but not defined in this Agreement shall, subject to Section 1.2, be construed in accordance with their plain meaning and shall not have the meanings (if any) given to them in Part A of Annex A (*Definitions and Abbreviations*) of the Project Agreement.
- (b) Except as otherwise specified herein, or as the context may otherwise require, the following terms have the respective meanings set out below for all purposes of this Agreement:

<u>"Collateral Agent"</u>	has the meaning given to it in the Preamble.
<u>"Collateral Agent Notice"</u>	has the meaning given to it in <u>Section 3.2(a)</u> .

“Cure Period” means, with respect to any Developer Default, the period commencing on the Enterprise Notice Date and ending on the earliest of:

- (a) the relevant Cure Period Completion Date;
- (b) any subsequent Step-out Date;
- (c) any subsequent Substitution Effective Date; and
- (d) the Expiry Date or the Termination Date, as applicable.

“Cure Period Completion Date” means, with respect to any Developer Default, the date which is:

- (a) in the case of each of the Developer Defaults numbered (9)¹ and (17) in Section 32.1.1 of the Project Agreement, 60 Calendar Days after the relevant Cure Period Measurement Date;
- (b) in the case of each of the Developer Defaults numbered (1), (2), (3) and (26) in Section 32.1.1 of the Project Agreement, 120 Calendar Days after the relevant Cure Period Measurement Date; and
- (c) in the case of any other Developer Default, 90 Calendar Days after the relevant Cure Period Measurement Date, subject to extension for up to (1) an additional 180 Calendar Days, in the case of the Developer Default numbered (5) in Section 32.1.1 of the Project Agreement, or (2) an additional 90 Calendar Days, in the case of all other such Developer Defaults, in the case of each of (1) and (2) to the extent, and only to the extent, that:
 - (i) within such initial 90 Calendar Day period, the Collateral Agent and the Enterprises agree (each acting reasonably) to a plan specifying the remedial action to be taken in respect of the relevant Developer Default during such extended period; and
 - (ii) the period of extension requested by the Collateral Agent represents, in the reasonable opinion of the Enterprises, the period of time necessary to cure the relevant Developer Default in accordance with such plan,

provided that, notwithstanding the foregoing, if:

- (d) the Collateral Agent is prohibited by any Governmental Authority or court order, or by any bankruptcy or insolvency proceedings or other similar proceedings, from curing the relevant Developer Default; or

¹ **Note to Proposers:** Developer Default number (9) will be revised in a future Addendum to read: “Any Developer-Related Entity commits a Prohibited Act and such entity is: (a) Developer; or (b) any other Developer-Related Entity: (i) acting in concert with Developer; or (ii) acting independently of Developer, but with Developer’s prior knowledge, unless (with respect to (ii)) Developer promptly notifies the Enterprises and, as required by Law, any other relevant Governmental Authorities, of such Prohibited Act (in which case Developer Default numbered (22) in Section 32.1.1 shall apply with respect to such Prohibited Act).” Conforming revisions will also be made to Developer Default number (22).

- (e) the Collateral Agent has commenced and is continuing to pursue all reasonably necessary processes and steps to obtain possession, custody and control of the Project and/or Developer, but despite such efforts the Collateral Agent is unable to obtain such possession, custody and control,

then the Cure Period Completion Date applicable to the relevant Developer Default (including, for certainty, as extended in accordance with paragraph (c) of this definition) shall be extended by a period of time equal to:

- (f) in the case of paragraph (d), the period of such prohibition or inability, provided that, if the relevant bankruptcy or insolvency proceedings or other similar proceedings were commenced by the Collateral Agent acting on behalf of the Lenders, such period shall instead be the shorter of the period of:
 - (i) such prohibition or inability; and
 - (ii) 270 Calendar Days; and
- (g) in the case of paragraph (e), the shorter of the period of:
 - (i) such prohibition or inability; and
 - (ii) 180 Calendar Days.

“Cure Period Measurement Date”

means, with respect to any Developer Default, the later of:

- (a) the Enterprise Notice Date; and
- (b) the date of expiration of the relevant Developer Default Cure Period pursuant to Sections 32.1.1 and 32.1.2 of the Project Agreement.

“Default”

any event or circumstance that would (with the expiration of a grace period, the giving of notice, the lapse of time, the making of any determination or any combination of any of the foregoing) result in an Event of Default.

“Designated Account” means [].²

“Developer” has the meaning given to it in the Preamble.

“Enterprises” has the meaning given to it in the Preamble.

“Enterprise Notice” has the meaning given to it in Section 3.1(a).

“Enterprise Notice Date” means the date on which the Collateral Agent receives the Enterprise Notice with respect to a Developer Default as determined pursuant to Section 15.5(b).

“Event of Default” means any “Event of Default” as defined in the Financing Documents.³

“Lenders” has the meaning given to it in the Recitals.

² See Section 2.3 below. Revise to reflect Developer’s financing plan and Lenders’ secured account requirements.

³ Modify as needed to conform to the Financing Documents.

<u>“Lenders’ Subcontract Direct Agreements”</u>	means []. ⁴
<u>“Private Sector Parties”</u>	means Developer and the Collateral Agent.
<u>“Project Agreement”</u>	has the meaning given to it in the Recitals.
<u>“Step-in Date”</u>	has the meaning given to it in <u>Section 5.3</u> .
<u>“Step-in Entity”</u>	has the meaning given to it in <u>Section 5.1</u> .
<u>“Step-in Entity Accession Agreement”</u>	means any agreement entered into by a Step-in Entity pursuant to <u>Section 5.3</u> .
<u>“Step-in Notice”</u>	has the meaning given to it in <u>Section 5.1(a)</u> .
<u>“Step-in Period”</u>	means any period from and including the relevant Step-in Date until the earliest of: <ul style="list-style-type: none">(a) the Cure Period Completion Date with respect to the relevant Developer Default;(b) any subsequent Substitution Effective Date;(c) the relevant Step-out Date; and(d) the Expiry Date or the Termination Date, as applicable.
<u>“Step-out Date”</u>	means the date upon which any Step-out Notice is served by a Step-in Entity pursuant to <u>Section 5.5(a)</u> .
<u>“Step-out Notice”</u>	has the meaning given to it in <u>Section 5.5(a)</u> .
<u>“Substitute”</u>	has the meaning given to it in <u>Section 6.1</u> .
<u>“Substitute Accession Agreement”</u>	means any agreement entered into by a Substitute pursuant to <u>Section 7.1</u> .
<u>“Substitution Effective Date”</u>	has the meaning given to it in <u>Section 7.1</u> .
<u>“Substitution Notice”</u>	has the meaning given to it in <u>Section 6.1(a)</u> .

1.2 Interpretation

- (a) Headings and other internal references
 - (i) Headings are inserted for convenience only and shall not affect interpretation of this Agreement.
 - (ii) Except as the context may otherwise provide, the words “herein”, “hereof” and “hereunder”, and words of similar import, shall be construed to refer to this Agreement in its entirety and not to any particular provision of it.
 - (iii) Except as otherwise expressly provided or as the context may otherwise provide, a reference to any Section or Annex within this Agreement is a reference to such Section of, or Annex to, this Agreement.
- (b) Common terms and references
 - (i) The singular includes the plural and vice versa.

⁴ Define by reference to the relevant direct agreements listed in Annex A.

- (ii) Words preceding “include”, “includes”, “including” and “included” shall be construed without limitation by the words that follow.
 - (iii) The word “promptly” means as soon as reasonably practicable in light of then-prevailing circumstances.
- (c) References to agreements, documents and Persons
- Except as otherwise expressly provided in this Agreement, a reference:
- (i) to an agreement or other document shall be construed to be a reference to such agreement or other document (including any schedules, annexes or exhibits thereto) as it may be amended, modified or supplemented from time to time in accordance with its terms and the terms of the Project Agreement and of the Financing Documents, as applicable; and
 - (ii) to a Person includes such Person’s successors and permitted assigns and transferees.
- (d) Deadlines occurring on Calendar Days
- Whenever this Agreement requires the Enterprises to make any payment, or provide or deliver any Acceptance, Approval, consent, approval or like assent, notice, comment or any information or material, or otherwise complete any action or performance, in each case on or no later than a date that is a Calendar Day that is not also a Working Day, then such deadline shall automatically be extended to the next Working Day to occur after such Calendar Day.

1.3 Relationship to Project Agreement

- (a) In the event of any conflict, ambiguity or inconsistency between the provisions of the Project Agreement and the provisions of this Agreement, the provisions of this Agreement shall prevail.
- (b) Notwithstanding the foregoing Section 1.3(a), nothing in this Agreement amends or modifies any of Developer’s obligations under the Project Agreement.

2. CONSENT TO SECURITY; ETC.

2.1 Enterprises’ Acknowledgement of and Consent to Security

- (a) The Enterprises acknowledge notice and receipt of, and consent to:
 - (i) the collateral assignment by Developer to the Collateral Agent of any or all of Developer’s rights, title, interests in, to or under or derived from, and obligations under, the Project Agreement, the Subcontracts, the Contractor Bonds (to the extent Developer is an obligee (or beneficiary) thereunder) and the Insurance Policies, in each case pursuant to the Financing Documents; and
 - (ii) the grant by each of the Equity Members to the Collateral Agent of a security interest in its respective equity interest in Developer, in each case pursuant to the Financing Documents.
- (b) The Enterprises acknowledge and agree that none of the security interests referred to in Section 2.1(a) nor the foreclosure or enforcement of any thereof:
 - (i) constitutes (or with the giving of notice or lapse of time, or both, could constitute) either a breach of the Project Agreement or a Developer Default; or
 - (ii) requires any consent of the Enterprises that is either additional or supplemental to that granted pursuant to this Section 2.1.
- (c) For so long as any amount of Project Debt is outstanding, the Enterprises shall not, without the prior written consent of the Collateral Agent, consent to any assignment,

transfer, pledge or hypothecation of the Project Agreement or any interest therein by Developer, other than as specified in this Agreement.

2.2 Payments to Designated Account

- (a) Unless directed otherwise by the Collateral Agent, the Enterprises shall pay all amounts payable by them to Developer under the Project Agreement into the Designated Account.
- (b) Developer and the Collateral Agent both agree that any payment made by the Enterprises in accordance with Section 2.2(a) shall constitute a complete discharge of the Enterprises' relevant payment obligations under the Project Agreement.

2.3 Limitations on Collateral Agent's Rights and Interests

- (a) The Collateral Agent acknowledges and agrees that neither it nor the Lenders shall, by virtue of the security interests referred to in Section 2.1(a), acquire any greater rights to or under the Project Agreement, the Subcontracts, the Contractor Bonds (to the extent Developer is an obligee (or beneficiary) thereunder) or Insurance Policies than Developer itself has at any particular time therein.
- (b) In the event that there are payment obligations owing to any of the Developer's or Principal Subcontractor's, as the case may be, direct or indirect Subcontractors and laborers on account of any unpaid charges, liens, supplies, claims or invoices for work performed or materials supplied by such Subcontractors and laborers to the Project, then:
 - (i) the Enterprises; or
 - (ii) the Collateral Agent (other than during a Cure Period or a Step-in Period, with the prior written consent of Enterprises (such consent not to be unreasonably withheld, conditioned or delayed)),

shall each be entitled to call upon any Contractor Bond⁵ to satisfy any such payment obligations; provided that, during a Cure Period or a Step-in Period, the Enterprises shall only be entitled to take such action if (A) the relevant Person has filed a verified statement of the amounts owing and unpaid with the Enterprises in accordance with C.R.S. § 38-26-107 and (B) the Collateral Agent has not called upon such Contractor Bond to satisfy such payment obligations and the Collateral Agent does not call upon such Contractor Bond within 15 Working Days after written notice from the Enterprises of the Enterprises' intent to take such action. Neither the Collateral Agent nor the Enterprises shall be entitled to call on such Contractor Bond or to use any proceeds of any call on any such Contractor Bond to satisfy performance obligations of Developer or any Principal Subcontractor (as applicable) under the Project Agreement or relevant Principal Subcontract (as applicable) until any such outstanding payment obligations have been fully satisfied.

2.4 Collateral Agent Response to Project Agreement Amendment and Waiver Requests

To the extent that any Developer consent to the amendment to, or any waiver of the requirements of any provision of, the Project Agreement requires the Lenders' and/or the Collateral Agent's consent pursuant to the Financing Documents, the Collateral Agent agrees that in response to any written request from Developer for such a consent it shall:

- (a) promptly seek instructions from the Lenders in accordance with the Financing Documents; and

⁵ The draft Project Agreement contemplates a single form of Contractor Bond. The Preferred Proposer may elect to provide two bonds (one for payment, and one for performance) each in an amount equal to the required value of the Contractor Bond in lieu of the single form of Contractor Bond and otherwise in a form accepted by the Enterprises. This provision (and other relevant provisions) would therefore be modified as needed prior to execution to reflect the use of separate bonds. **Note to Proposers:** This accommodation will also be reflected in the Project Agreement in a future Addendum.

- (b) once instructed, promptly respond in writing to any such request.

2.5 Agreement to Act Reasonably

The Collateral Agent acknowledges and agrees that it shall act reasonably in responding to any Developer request to the Collateral Agent made under the Financing Documents to take any action, including the giving or withholding of any consent, approval or like assent, under the Project Agreement to the extent that Developer is required to act reasonably under such circumstances by the terms of the Project Agreement.

3. NOTICES

3.1 Enterprise Notices

- (a) The Enterprises shall give the Collateral Agent notice (any such notice, an “Enterprise Notice”) promptly upon becoming aware of the occurrence of any Developer Default, and shall specify in the Enterprise Notice:
 - (i) the unperformed obligations of, and uncured breaches by, Developer under the Project Agreement of which the Enterprises are aware (having made reasonable inquiry) and the resulting potential grounds for termination of the Project Agreement in sufficient detail to enable the Collateral Agent to assess the scope and amount of any liability of Developer resulting therefrom;
 - (ii) all amounts due and payable by Developer to the Enterprises under the Project Agreement, if any, on or before the date of the Enterprise Notice and which remain unpaid at such date and the nature of Developer's obligation to pay such amounts; and
 - (iii) the amount of any payments that the Enterprises reasonably foresee shall become due and payable from Developer to the Enterprises under the Project Agreement during the relevant Cure Period.
- (b) The Enterprises:
 - (i) may give the Collateral Agent multiple concurrently effective Enterprise Notices; and
 - (ii) shall provide updates to any Enterprise Notice given pursuant to Section 3.1(a) as and when they become aware of any unperformed obligations of, or any uncured breaches by, Developer (including non-payment of amounts that have become due) under the Project Agreement of the kind referenced in Sections 3.1(a)(i) and 3.1(a)(ii) that were not specified in the relevant Enterprise Notice or any prior updates thereto.

3.2 Collateral Agent Notices

The Collateral Agent shall:

- (a) promptly upon becoming aware of any Event of Default, give the Enterprises notice of such event (a “Collateral Agent Notice”) specifying the circumstances and nature of such event; and
- (b) notify the Enterprises of any decision to accelerate any portion of the Project Debt or to exercise any enforcement remedies under the Financing Documents promptly upon the taking of such decision.

4. RIGHTS AND OBLIGATIONS DURING THE CURE PERIOD

4.1 No Termination during the Cure Period

At any time during a Cure Period, the Enterprises shall not, subject to the terms of this Agreement:

- (a) deliver a Termination Notice for Developer Default;
- (b) directly or indirectly, take any action to initiate, or join in or support the initiation of, any Insolvency Event in respect of Developer, provided that, for certainty, if any Insolvency Event has occurred with respect to Developer (other than as a result of the Enterprises' breach of this Section 4.1(b)), this Section 4.1(b) shall not restrict or impair the ability of the Enterprises to participate in any related proceedings in order to preserve or protect their rights under the Project Agreement and/or their interests in the Project;
- (c) suspend their performance under the Project Agreement, (including in connection with any Insolvency Event in respect of Developer) unless the grounds for suspension of performance arose during the Cure Period, provided that, for certainty, the Enterprises may exercise their rights to suspend the Work pursuant to Section 23.3 of the Project Agreement;
- (d) notwithstanding anything to the contrary in Section 9.3.4 of the Project Agreement, but subject to Section 2.3(b) of this Agreement, exercise its remedies as obligee or additional obligee (or beneficiary) under a Contractor Bond; or
- (e) fail to pay any amount that becomes due and payable from them to Developer under the Project Agreement during such period into the Designated Account in accordance with Section 2.2(a).

4.2 Collateral Agent Rights

- (a) At any time during the continuation of an Event of Default or a Developer Default (in the case of a Developer Default only, for so long as the Cure Period has not expired), without giving a Step-in Notice, the Collateral Agent may (but shall have no obligation to), at any time and at its discretion, perform or arrange for the performance of any act, duty or obligation required of Developer under the Project Agreement, or cure any breach of Developer thereunder or any Developer Default, which performance or cure by or on behalf of the Collateral Agent the Enterprises agree to accept in lieu of performance or cure by Developer and in satisfaction of Developer's corresponding obligations. For certainty, to the extent that any breach of Developer under the Project Agreement is cured and/or any payment liabilities or obligations of Developer are performed by the Collateral Agent under this Section 4.2(a), such action shall discharge the relevant liabilities or obligations of Developer to the Enterprises.
- (b) Subject to the terms of this Agreement, no performance or cure by or on behalf of the Collateral Agent in accordance with Section 4.2(a) shall be construed as an assumption by the Collateral Agent, or any person acting on the Collateral Agent's behalf, of any of the covenants, agreements or other obligations of Developer under the Project Agreement.
- (c) The Collateral Agent may:
 - (i) give a Step-in Notice in accordance with the requirements of Section 5.1; or
 - (ii) give a Substitution Notice in accordance with the requirements of Section 6.1; provided that the Collateral Agent delivers any such notice:
 - (iii) during a Cure Period; or

- (iv) following the occurrence of an ongoing Event of Default that is not also a Developer Default.

5. STEP-IN ARRANGEMENTS

5.1 Step-in Notice

If at any time the Collateral Agent proposes that any Person become a joint and several obligor with Developer under the Project Agreement and this Agreement in accordance with the terms hereof (any such Person, a "Step-in Entity"), the effectiveness of such arrangement shall be conditional upon:

- (a) the Collateral Agent giving a notice ("Step-in Notice") to the Enterprises, at any time that such notice delivery is permitted pursuant to Section 4.2(c), requesting the Enterprises' consent to the proposed Step-in Entity;
- (b) the Enterprises' approval (or deemed approval) of the identity of the proposed Step-in Entity pursuant to Section 5.2; and
- (c) the proposed Step-in Entity executing a Step-in Entity Accession Agreement in accordance with Section 5.3.

5.2 Grounds for Refusing Approval of Proposed Step-in Entity

- (a) The Enterprises shall not be entitled to withhold their approval of any proposed Step-in Entity that is the subject of a Step-in Notice unless:
 - (i) the proposed Step-in Entity is disqualified, suspended or debarred, or subject to a proceeding to suspend or debar it, from bidding, proposing or contracting with any state-level, interstate or Federal Governmental Authority;
 - (ii) the proposed step-in is prohibited by statute, law or regulation; or
 - (iii) there is any outstanding Developer Default numbered (17) in Section 32.1.1 that has not been remedied or waived on or prior to the date of the Step-in Notice.
- (b) The Enterprises shall be deemed to have approved any proposed Step-in Entity that is the subject of a Step-in Notice:
 - (i) in the case of any entity that is the Collateral Agent, a Lender or any of their respective Affiliates (including an entity wholly owned by a Lender or group of Lenders), on the fifth Working Day after the date on which the Enterprises receive the relevant Step-in Notice if the Enterprises have not responded to such notice within such period of time; and
 - (ii) in all other cases, on the 15th Working Day after the date on which the Enterprises receive the relevant Step-in Notice if the Enterprises have not responded to such notice within such period of time.

5.3 Step-in Date

If the Enterprises approve (or, pursuant to Section 5.2(b), are deemed to approve) a Step-in Entity pursuant to Section 5.2, the Step-in Entity shall be deemed to become a party to the Project Agreement and this Agreement on and from the date it executes a duly completed Step-in Entity Accession Agreement, substantially in the form attached hereto as Exhibit A, and submits it to Enterprises (the "Step-in Date").

5.4 Rights and Obligations on Step-in

- (a) On and from the Step-in Date and during the Step-in Period, the Step-in Entity shall be:
 - (i) jointly and severally entitled to exercise and enjoy the rights and powers expressed to be assumed by or granted to Developer under the Project Agreement;

- (ii) entitled to exercise and enjoy the rights and powers expressed to be assumed by or granted to a Step-in Entity under this Agreement; and
 - (iii) jointly and severally liable with Developer for the payment of all sums due from Developer under or arising out of the Project Agreement on or after the Step-in Date and for the performance of all of Developer's obligations (including payment obligations) under or arising out of the Project Agreement on or after the Step-in Date.
- (b) Without prejudice to Section 8, during the Step-in Period:
- (i) the Enterprises undertake:
 - (A) not to deliver a Termination Notice for Developer Default, unless the grounds for the termination arose during the Step-in Period as a result of the occurrence of a new Developer Default (subject to the expiry of the Cure Period applicable to such new Developer Default without such Developer Default having been cured);
 - (B) not to, directly or indirectly, take any action to initiate, or join in or support the initiation of, any Insolvency Event in respect of Developer, provided that, for certainty, if any Insolvency Event has occurred with respect to Developer (other than as a result of the Enterprises' breach of this Section 5.4(b)(i)(B)), this Section 5.4(b)(i)(B) shall not restrict or impair the ability of the Enterprises to participate in any related proceedings in order to preserve or protect their rights under the Project Agreement and/or their interests in the Project;
 - (C) not to suspend their performance under the Project Agreement, (including in connection with any Insolvency Event in respect of Developer) unless the grounds for suspension of performance arose during the Step-in Period, provided that, for certainty, the Enterprises may exercise their rights to suspend the Work pursuant to Section 23.3 of the Project Agreement;
 - (D) notwithstanding anything to the contrary in Section 9.3.4 of the Project Agreement, but subject to Section 2.3(b) of this Agreement, not to exercise its remedies as obligee or additional obligee (or beneficiary) under a Contractor Bond; and
 - (E) to continue to make payments required to be made to Developer under the Project Agreement to the Designated Account;
 - (ii) the Enterprises shall owe their obligations under the Project Agreement to Developer and any Step-in Entity jointly, provided, that:
 - (A) subject to Section 5.4(b)(ii)(B), the performance of such obligations by the Enterprises in favor of either Developer or such Step-in Entity shall be a good and effective discharge of such obligations under the Project Agreement or this Agreement, as the case may be; and
 - (B) the Collateral Agent shall be entitled at any time by notice to the Enterprises to direct (such direction being binding on the Collateral Agent, the Enterprises and Developer) that, at all times thereafter while such Step-in Entity is deemed to be a party to the Project Agreement and this Agreement and subject to any further notice from the Collateral Agent, such Step-in Entity shall be solely entitled to make any decisions, to give any directions, approvals or consents, to receive any payments or otherwise to deal with the Enterprises in the place of Developer under the Project Agreement and this Agreement.

- (c) Developer shall not be relieved from any of its obligations under the Project Agreement, whether arising before or after the Step-in Date, by reason of the Step-in Entity becoming a party to the Project Agreement pursuant to a Step-in Entity Accession Agreement.

5.5 Step Out

- (a) A Step-in Entity may, at any time, by giving not less than 30 Calendar Days' prior notice ("Step-out Notice") to the Enterprises, terminate its obligations to the Enterprises under the Project Agreement and this Agreement. Upon the expiry of such notice, the Step-in Entity shall no longer be deemed to be a party to the Project Agreement and this Agreement and shall (subject to Section 5.5(b)) be released from all such obligations. The obligations of the Enterprises to the Step-in Entity in such capacity under the Project Agreement and this Agreement shall also terminate upon the expiry of such notice.
- (b) Nothing in this Section 5.5 shall have the effect of releasing a Step-in Entity from any liability that relates to the performance or non-performance of the Project Agreement or this Agreement by Developer or such Step-in Entity during the Step-in Period.

6. SUBSTITUTION PROPOSALS

6.1 Notice of Proposed Substitute

If at any time the Collateral Agent proposes to require Developer to assign its rights and transfer its obligations under the Project Agreement and this Agreement to a Person (a "Substitute") designated by the Collateral Agent (whether by mutual agreement or enforcement of rights under the Financing Documents), the effectiveness of such assignment and transfer shall be conditional upon:

- (a) the Collateral Agent giving a notice (a "Substitution Notice") to the Enterprises, at any time that such notice delivery is permitted pursuant to Section 4.2(c), requesting their approval of the proposed Substitute;
- (b) the Enterprises' approval of the identity of the proposed Substitute pursuant to Section 6.2 to the extent required thereunder; and
- (c) the proposed Substitute executing a Substitute Accession Agreement in accordance with Section 7.1.

6.2 Grounds for Refusing Approval

- (a) The Enterprises shall not be entitled to withhold, or (where the Enterprises are otherwise entitled to withhold approval) make subject to the condition of the provision of additional security or other arrangements, their approval of any proposed Substitute that is the subject of a Substitution Notice, unless:
 - (i) the proposed Substitute is disqualified, suspended or debarred, or subject to a proceeding to suspend or debar it, from bidding, proposing or contracting with any state-level, interstate or Federal Governmental Authority;
 - (ii) the proposed substitution is prohibited by statute, law or regulation;
 - (iii) after the proposed substitution, the Substitute's ability to perform its obligations as Developer under the Project Agreement would be insufficient to ensure performance of such obligations under the Project Agreement, a determination as to which the Enterprises may base upon or take into account (A) the legal capacity, power and authority of the Substitute to become a party to, and perform the obligations of Developer under the Project Agreement and/or (B) the resources (including committed financial resources), past performance, relevant experience and proposed subcontracting arrangements of the proposed Substitute and, if applicable, of its proposed Subcontractors, in light of the then current performance requirements under the Project Agreement; or

- (iv) subject to Section 7.4, there are outstanding Developer Defaults or breaches of the Project Agreement that have been previously notified by the Enterprises to the Collateral Agent, that either:
 - (A) have not, to the reasonable satisfaction of the Enterprises, been remedied or waived prior to the 30th Calendar Day after the date on which the Enterprises receive the information required pursuant to Section 6.3; or
 - (B) if not so remedied or waived, are not the subject of a plan approved by the Enterprises (such approval not to be unreasonably withheld, conditioned or delayed) specifying:
 - (I) subject to Section 6.2(a)(iv)(B)(II), the remedial action that the Substitute shall take after the Substitution Effective Date in order to remedy each such Developer Default or breach; and
 - (II) with respect to any such Developer Default or breach that is incapable of being cured by the proposed Substitute, the action the Substitute shall take after the Substitution Effective Date in order to mitigate the material adverse effects (if any) of such Developer Default or breach on or in relation to the Project and to prevent such Developer Default or breach (if capable of repetition) from occurring in the future.
- (b) The Enterprises shall be deemed to have approved any proposed Substitute that is the subject of a Substitution Notice on the 30th Calendar Day after the date on which the Enterprises receive the information required pursuant to Section 6.3 if the Enterprises have not responded to such notice within such period of time.

6.3 Provision of Information

The Collateral Agent shall promptly provide to the Enterprises such information in relation to (i) a proposed Substitute and (ii) any Person who it is proposed shall enter into a material Subcontract with the proposed Substitute in relation to the Project, as the Enterprises shall reasonably require to enable them to make their determination whether or not to provide their approval of the Substitute pursuant to Section 6.2, including:

- (a) the name and address of the proposed Substitute;
- (b) unless such proposed Substitute is a publicly traded entity, the names of the proposed Substitute's shareholders or members together with the share capital or partnership or membership interests, as the case may be, held by each of them;
- (c) the manner in which the proposed Substitute will be financed and the extent to which such financing is committed (to the extent relevant);
- (d) copies of the proposed Substitute's financial statements (audited, if available) for its three most recent financial years (or such shorter period as such entity has been in existence) or, in the case of a special purpose company, its opening balance sheet;
- (e) a copy of the proposed Substitute's organizational documents; and
- (f) details of the resources available to the proposed Substitute and the proposed Substitute's qualifications, experience and technical competence to perform the obligations of Developer under the Project Agreement, including the names, qualifications, experience and technical or other professional competence of the proposed Substitute's directors and any key personnel who will have responsibility for the day-to-day management of its participation in the Project.

7. SUBSTITUTION

7.1 Substitution Effective Date

If the Enterprises approve (or, pursuant to Section 6.2(b), are deemed to approve) a proposed Substitute pursuant to Section 6.2, the Substitute shall execute a duly completed Substitute Accession Agreement substantially in the form set out in Exhibit B to this Agreement and submit it to the Enterprises (with a copy to the Colorado State Controller and the other parties to this Agreement). Such agreement shall become effective on and from the earlier of (a) the date on which the Colorado State Controller countersigns the Substitute Accession Agreement and (b) the date that is 10 Calendar Days after the date on which the Colorado State Controller receives the completed Substitute Accession Agreement from Developer (the "Substitution Effective Date").

7.2 Effectiveness of Substitution

On and from the Substitution Effective Date:

- (a) the Substitute shall become a party to the Project Agreement and this Agreement in place of Developer;
- (b) Developer shall be immediately released from its obligations arising under, and cease to be a party to, the Project Agreement and this Agreement;
- (c) the Substitute shall exercise and enjoy the rights and perform the obligations of Developer under the Project Agreement and this Agreement, including, without limitation, any and all undischarged obligations of Developer that were the subject of any plan approved by the Enterprises pursuant to Section 6.2(a)(iv)(B)(II); and
- (d) the Enterprises shall owe their obligations (including any undischarged obligations of the Enterprises that were otherwise required to be performed by the Enterprises prior to the Substitution Effective Date) under the Project Agreement and this Agreement to such Substitute in place of (i) Developer and (ii) if a Step-in Date has previously occurred, any Step-in Entity.

7.3 Facilitation of Transfer

The Enterprises shall use Reasonable Efforts to facilitate the transfer to the Substitute of Developer's obligations under the Project Agreement and this Agreement.

7.4 Settlement of Outstanding Financial Liabilities

- (a) The Substitute shall pay to the Enterprises any amount due from Developer to the Enterprises under the Project Agreement and this Agreement as of the Substitution Effective Date within 30 Calendar Days after such Substitution Effective Date (or, if later, within 30 Calendar Days after the date of notice from the Enterprises to the Substitute of such amount).
- (b) If the Substitute fails to satisfy its obligations pursuant to Section 7.4(a), the Enterprises shall be entitled to exercise their rights under the Project Agreement in respect of the amount so due and unpaid.

7.5 Consequences of Substitution

On and from the Substitution Effective Date:

- (a) subject to Section 7.4 and the Substitute's obligation to perform any and all undischarged obligations of Developer that were the subject of any plan approved by the Enterprises pursuant to Section 6.2(a)(iv)(B)(II), any right of termination under the Project Agreement or this Agreement or any other right under the Project Agreement or this Agreement previously suspended by virtue of Section 4.1 and/or Section 5.4 shall be of no further effect and the Enterprises shall not be entitled to terminate either the Project Agreement or this Agreement by virtue of any act, omission or circumstance (including any breach, Developer Default, Noncompliance Points, Construction Closure Deductions or Operating

Period Closure Deductions) that occurred or accrued prior to the Substitution Effective Date;

- (b) if any Step-in Entity is a party to or has any obligations under the Project Agreement or this Agreement on the Substitution Effective Date, such Step-in Entity shall cease to be a party thereto and hereto and shall be discharged from all obligations thereunder and hereunder; and
- (c) the Enterprises, the Collateral Agent and the Substitute (replacing Developer as a party) (each acting reasonably) shall enter into a direct agreement on substantially the same terms as this Agreement.

8. REINSTATEMENT OF REMEDIES

If:

- (a) an Enterprise Notice has been given;
- (b) the Developer Default that is the subject-matter of such notice is continuing and has not been remedied or waived by the Enterprises; and
- (c) either:
 - (i) no Step-in Entity or Substitute becomes a party to the Project Agreement and this Agreement pursuant to Section 5.3 or 7.2(a), as applicable, prior to the relevant Cure Period Completion Date; or
 - (ii) a Step-in Entity becomes a party to the Project Agreement and this Agreement pursuant to Section 5.3, as applicable, prior to the relevant Cure Period Completion Date, but the Step-in Period relating to such Step-in Entity ends without a Substitute becoming a party thereto and hereto,

then, on and from the relevant Cure Period Completion Date, the Enterprises shall be entitled to:

- (iii) act upon any and all grounds for termination available to it in relation to the Project Agreement in respect of any Developer Defaults that have not been remedied or otherwise waived by the Enterprises;
- (iv) pursue any and all available claims and exercise any and all available remedies against Developer; and
- (v) if and to the extent that they are then entitled to do so under the Project Agreement, take, initiate, join in or support any action of the type referred to in Section 4.1(b).

9. REJECTION OF THE PROJECT AGREEMENT IN BANKRUPTCY OR INSOLVENCY PROCEEDINGS

- (a) If the Project Agreement is rejected by a trustee or debtor-in-possession, or terminated, as a result of any Insolvency Event involving Developer and, within 150 Calendar Days after such rejection or termination, the Collateral Agent shall so request and shall certify in writing to the Enterprises that the Collateral Agent or the Collateral Agent's Substitute intends to perform the obligations of Developer as and to the extent required under the Project Agreement, the Enterprises shall execute and deliver to the Collateral Agent (or, subject to prior compliance with the provisions of, and procedures set out in, Sections 6 and 7, any permitted Substitute) a new project agreement. Such new project agreement shall be on the same terms and conditions as the Project Agreement, except with respect to any obligations that have been fulfilled by Developer or by any party acting on behalf of or stepping-in for Developer prior to such rejection or termination. References in this Agreement to the "Project Agreement" shall be deemed also to refer to any such new project agreement as executed.
- (b) The effectiveness of any new project agreement referred to in Section 9(a) shall be conditional upon the Collateral Agent first reimbursing the Enterprises in respect of their

costs incurred in connection with the execution and delivery of such new project agreement.

10. TERMINATION OF THIS AGREEMENT

This Agreement shall remain in effect until the earliest to occur of:

- (a) the date on which all of the obligations of Developer under the Financing Documents have been irrevocably discharged in full to the satisfaction of the Collateral Agent;
- (b) the date on which all of the parties' respective obligations and liabilities under the Project Agreement and this Agreement have expired or have been satisfied in accordance with the terms of the same; and
- (c) any assignment and transfer to a Substitute has occurred pursuant to Sections 6 and 7 and the Enterprises, the Collateral Agent and the Substitute shall have entered into a direct agreement pursuant to Section 7.5(c).

11. PRESERVATION OF FUNDS

The Collateral Agent acknowledges the provisions of Section 25.5 (*Reinstatement*) of, and Section 4 of Schedule 12 (*Handback Requirements*) to, the Project Agreement.

12. COMPETING STEP-IN RIGHTS

12.1 Forbearance

Notwithstanding any provision in any Principal Subcontractor Direct Agreement to the contrary, the Enterprises agree that they shall not exercise any rights of step-in, novation or other similar rights they may have under any such Principal Subcontractor Direct Agreement until:⁶

- (a) the Project Agreement has been terminated (other than pursuant to an assignment or transfer to a Substitute pursuant to Sections 6 and 7) or expired;
- (b) any relevant period under any Lenders' Subcontract Direct Agreement during which the Collateral Agent is entitled to either exercise or procure the exercise of rights of step-in, novation, transfer or any similar right thereunder has expired; or
- (c) if the Collateral Agent has exercised or procured the exercise of any such rights of step-in, novation, transfer or any similar right, the date of any step-out or similar event (howsoever defined) under the relevant Lenders' Subcontract Direct Agreement has occurred pursuant to which the Collateral Agent (on behalf of the Lenders) has voluntarily ceased to exercise such novation, transfer or similar rights.

12.2 Expiry of Lender Rights

- (a) The Collateral Agent shall notify the Enterprises promptly after the date on which the Collateral Agent either:
 - (i) has determined (and the Collateral Agent shall so certify in such notice) that the Collateral Agent has exhausted all of its direct or indirect legal rights and remedies pursuant to the Financing Documents or a Principal Subcontract against the related Principal Subcontractor, any guarantor of such Principal Subcontractor's obligations under the relevant Principal Subcontract and any provider of any Contractor Bond that has been provided by such Principal Subcontractor in favor of Developer in accordance with Section 9.3.2.b. of the Project Agreement; or
 - (ii) has determined (A) not to exercise (or to cease exercising) or (B) that, as a result of a release in full of the security interests referred to in Section 2.1(a), it and the Lenders are no longer entitled to exercise), the same,

⁶ These provisions will be adjusted as needed to reflect the terms of the Lenders' Subcontract Direct Agreement(s), e.g., if there is no cure period thereunder.

it being acknowledged that any determination to exercise, not to exercise or to cease exercising any such legal rights and remedies shall be in the sole discretion of the Collateral Agent acting in accordance with the Financing Documents.

- (b) Following receipt by the Enterprises of a notice from the Collateral Agent pursuant to Section 12.2(a) (the date of such receipt, the "Subordination Date"), all of the right, title and interest of the Collateral Agent (and each Lender) against:
- (i) the relevant Principal Subcontractor;
 - (ii) any guarantor of such Principal Subcontractor's obligations under the relevant Principal Subcontract; and
 - (iii) any provider of any Contractor Bond that has been provided by such Principal Subcontractor in favor of Developer in accordance with Section 9.3.2.b. of the Project Agreement,

pursuant to the Financing Documents or any relevant Principal Subcontract, guaranty or Contractor Bond shall be subject and subordinated in all respects to all right, title and interest of the Enterprises pursuant to the relevant Principal Subcontractor Direct Agreement.

- (c) Notwithstanding any provision in any Principal Subcontractor Direct Agreement to the contrary, the Enterprises agree that, prior to the Subordination Date, they shall not exercise any rights or remedies against any Principal Subcontractor under the related Principal Subcontractor Direct Agreement (other than rights of step-in, novation or other similar rights they are permitted to exercise pursuant to Section 12.1).

13. REPRESENTATIONS AND WARRANTIES

13.1 Representations and Warranties of Collateral Agent

- (a) Each undersigned signatory for the Collateral Agent hereby represents and warrants that he or she (i) is an officer of the Collateral Agent and (ii) has full and complete authority to enter into this Agreement on behalf of the Collateral Agent.
- (b) The Collateral Agent hereby represents and warrants that the Collateral Agent has full power, right and authority to execute and perform each and all of its obligations under this Agreement.
- (c) The Collateral Agent represents and warrants that this Agreement constitutes a legal, valid and binding obligation of it enforceable against it in accordance with its terms, except as such enforceability may be limited by:
- (i) applicable bankruptcy, insolvency, reorganization, moratorium or other similar laws affecting the enforcement of creditors' rights generally; and
 - (ii) general principles of equity (regardless of whether such enforceability is considered in a proceeding in equity or at law).
- (d) The representations and warranties in Sections 13.1(a) and (b) are made for the benefit of the Enterprises and Developer for the purpose of inducing the Enterprises and Developer to enter into this Agreement.

13.2 Representations and Warranties of Developer

- (a) The undersigned signatory for Developer hereby represents and warrants that he or she (i) is an officer of Developer and (ii) has full and complete authority to enter into this Agreement on behalf of Developer.
- (b) Developer hereby represents and warrants that Developer has full power, right and authority to execute and perform each and all of its obligations under this Agreement.

- (c) The representations and warranties in Sections 13.2(a) and (b) are made for the benefit of the Enterprises and the Collateral Agent for the purpose of inducing the Enterprises and the Collateral Agent to enter into this Agreement.

13.3 Representations and Warranties of the Enterprises⁷

- (a) *[Representation as to due authority of the Enterprises' signatories]*
- (b) *[Representation as to power and authority of the Enterprises to execute and perform the Agreement]*
- (c) *[Representation as to execution and delivery by and enforceability against the Enterprises]*
- (d) Each Enterprise represents and warrants that, as of the date of this Agreement, no Enterprise Default or, to its knowledge, Developer Default has occurred and is continuing, and there exists no event or condition that would, with the giving of notice or passage of time or both, constitute an Enterprise Default or, to its knowledge, a Developer Default.
- (e) The representations and warranties in Sections 13.3(a) to (d) are made for the benefit of the Collateral Agent for the purpose of inducing the Collateral Agent to enter into this Agreement.

14. CHOICE OF LAW; JURISDICTION AND VENUE; DISPUTE RESOLUTION

14.1 Choice of Law

Colorado law, and rules and regulations issued pursuant thereto, shall be applied in the interpretation, execution, and enforcement of this Agreement. Any provision included or incorporated herein by reference which conflicts with said laws, rules, and regulations shall be null and void. Any provision incorporated herein by reference which purports to negate this provision or any other Special Provision set out in Section 15.14 in whole or in part shall not be valid or enforceable or available in any action at law, whether by way of complaint, defense, or otherwise. Any provision rendered null and void by the operation of this provision shall not invalidate the remainder of this Agreement, to the extent capable of execution.⁸

14.2 Jurisdiction and Venue

All suits or actions related to this Agreement shall be filed and proceedings held in the State and exclusive venue shall be in State or Federal court in the City of Denver, and each party hereto irrevocably waives:

- (a) any objection which it may have at any time to the laying of venue of any such suit, action or proceeding brought in any such court;
- (b) any claim that any such suit, action or proceeding has been brought in an inconvenient forum; and
- (c) the right to object that such court does not have any jurisdiction with respect to such suit, action or proceeding.

⁷ **Note to Proposers:** Representations to be included reflecting terms of Enterprise representations to be included in Schedule 2 in a future Addendum.

⁸ **Note to Proposers:** The Colorado Attorney General's Office and the Colorado State Controller's Office are considering modifications of this provision (and equivalent provisions set out in this Schedule 19 and the Project Agreement) to more closely align it (and such equivalent provisions) with customary market practice. Any resulting changes will be reflected in a future Addendum.

15. GENERAL PROVISIONS

15.1 Amendments and Waivers

- (a) This Agreement may only be amended by a written amendment duly executed by all parties together with, to the extent required by Law, the Colorado State Controller or its designee.
- (b) Except to the extent otherwise expressly provided in this Agreement:
 - (i) any waiver of, or consent to any departure from, the requirements of any provision of this Agreement shall be approved in the discretion of the party giving it and shall be effective only if it is in writing by such party, and only in the specific instance, for the specific time, subject to the specific conditions and for the specific purpose for which it has been given;
 - (ii) no failure on the part of any party to exercise, and no delay in exercising, any right or power under this Agreement shall operate as a waiver of such right or power; and
 - (iii) no single or partial exercise of any right or power under this Agreement, including any right to give or withhold any consent or approval, nor any abandonment or discontinuance of steps to enforce such a right or power, shall preclude or render unnecessary any other or further exercise of such right or the exercise of any other right.
- (c) For certainty, any waiver of any provision of this Agreement made by a party other than the Enterprises that would result in a violation of Part B of Schedule 16 (*Mandatory Terms*) to the Project Agreement shall be null and void unless approved by the Enterprises (in their discretion).

15.2 Successors and Assigns

- (a) Except to the extent expressly provided hereunder, no party to this Agreement may assign or transfer any part of its rights or obligations hereunder without the prior written consent of the other parties, provided that the Collateral Agent may assign or transfer its rights and obligations hereunder in accordance with the terms of this Agreement to a successor Collateral Agent in accordance with the Financing Documents (in connection with which, the Enterprises agree to enter into a new direct agreement with the successor Collateral Agent on terms that are substantially the same as those of this Agreement).
- (b) This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and permitted assigns.

15.3 Severability

- (a) If any provision (or part of any provision) of this Agreement is ruled invalid by a court having proper jurisdiction, then the parties shall:
 - (i) promptly meet and negotiate a substitute for such provision or part thereof which shall, to the greatest extent legally permissible, effect the original intent of the parties; and
 - (ii) if necessary or desirable, and to the extent the parties agree to do so, apply to the court which declared such invalidity for an interpretation of the invalidated provision (or part thereof) to guide the negotiations.
- (b) If any provision (or part of any provision) of this Agreement shall, for any reason, be held to be invalid, illegal, or unenforceable in any respect, such provision (or part thereof) shall not affect the validity, legality and enforceability of any other provision of (or the other part of such provision) or any other documents referred to in this Agreement, and this Agreement shall be construed as if such invalid, illegal, or unenforceable provision (or part thereof) had never been contained herein.

15.4 Entire Agreement

Subject to Section 1.3(b), this Agreement constitutes the entire agreement among the Enterprises, Developer and the Collateral Agent concerning the subject matter hereof and supersedes all prior negotiations, representations, and agreements, either oral or written, among the parties with respect to their subject matter.

15.5 Notices and Communications

(a) Any notice shall be given in writing by means of physical (including delivery by courier and postage pre-paid certified or registered mail), digital or electronic communication, but excluding the use of social media, messaging, broadcast and equivalent services, to the relevant party at the following addresses, as applicable:

<u>Developer</u>		<u>Enterprises</u>		<u>Collateral Agent</u>		<u>Colorado State Controller</u>	
Attention:	[]	Attention:	[]	Attention:	[]	Attention:	[]
[Address]		[Address]		[Address]		[Address]	
Phone:	[]	Phone:	[]	Phone:	[]	Phone:	[]
Email:	[]	Email:	[]	Email:	[]	Email:	[]

(b) A notice shall be deemed to have been delivered and received:

- (i) upon receipt (confirmed by automatic answer back, read receipt or equivalent evidence of receipt), if validly transmitted by digital or electronic distribution before 3:00 p.m. (local time at the place of receipt) on a Working Day;
- (ii) on the next Working Day following receipt (confirmed by automatic answer back, read receipt or equivalent evidence of receipt), if validly transmitted by digital or electronic distribution on or after 3:00 p.m. (local time at the place of receipt) on a Working Day;
- (iii) upon receipt, if physically delivered in person; or
- (iv) if delivered by courier or postage pre-paid certified or registered mail, on the date of receipt as shown by the addressee's registry or certification receipt or on the date receipt at the appropriate address is refused, as shown on the records or manifest of the United States Postal Service or independent courier.

(c) The parties will notify each other in writing of any change of address and/or contact information, such notification to become effective five Working Days after notification.

15.6 Effect of Breach

Without prejudice to any rights a party may otherwise have, a breach of this Agreement shall not of itself give rise to a right to terminate the Project Agreement.

15.7 Counterparts

This Agreement (or an amendment or waiver in respect to this Agreement) may be executed in one or more counterparts (including by electronic signature and/or scanned or digital transmission). Any single counterpart or a set of counterparts executed, in either case, by each of the parties and, to the extent required by Law, the Colorado State Controller or its designee, shall constitute a full and original instrument for all purposes.

15.8 No Third Party Beneficiaries

It is not intended by any of the provisions of this Agreement to create any third party beneficiary rights hereunder. Notwithstanding the foregoing, the duties, obligations and responsibilities of the parties with respect to third parties shall remain as imposed by Law.

15.9 No Partnership

Nothing in this Agreement is intended or shall be construed to create any partnership, joint venture or similar relationship or among the parties. None of the parties shall hold itself out contrary to the terms of this Section 15.9.

15.10 No Interference

Developer joins in this Agreement to acknowledge and consent to the arrangements set out and agrees not to knowingly do or omit to do anything that may prevent any party from enforcing its rights under this Agreement. For certainty, Developer has no right to enforce any provision of this Agreement.

15.11 Collateral Agent Liability

- (a) Notwithstanding anything to the contrary in this Agreement, but subject to Sections 3.2, 5, 13.1 and 15.14(e) the Collateral Agent shall not have any liability to the Enterprises under this Agreement, unless:
- (i) the Collateral Agent expressly assumes such liability in writing; or
 - (ii) such liability arises as a result of or is made in response to any breach of Law or fraud, willful misconduct, criminal conduct, recklessness, bad faith or gross negligence by or of the Collateral Agent.
- (b) The Enterprises acknowledge and agree that the Collateral Agent shall not be obligated or required to perform any of Developer's obligations under the Project Agreement, except during any Step-in Period and then solely to the extent the Collateral Agent or any of its Affiliates is the Step-In Entity.

15.12 No Personal Liability

Each Enterprise's authorized representatives, including the Enterprise Representative, are acting solely as agents and representatives of the Enterprises when carrying out the provisions of or exercising the power or authority granted to them under this Agreement, and, as such, none of them shall not be liable either personally or as employees of the Enterprises for actions in their ordinary course of employment.

15.13 Costs and Expenses of the Parties

Except as otherwise expressly provided in this Agreement or the Project Agreement, each party shall bear its own costs and expenses (including legal and other advisers' fees and expenses) in connection with the preparation, negotiation, execution and performance of this Agreement and all other related agreements.

15.14 Special Provisions

- (a) Controller's Approval
This Agreement shall not be valid until it has been approved by the Colorado State Controller or its designee.
- (b) Governmental Immunity
No term or condition of this Agreement shall be construed or interpreted as a waiver, express or implied, of any of the immunities, rights, benefits, protections, or other provisions, of the Colorado Governmental Immunity Act, C.R.S. §§24-10-101 *et seq.*, or the Federal Tort Claims Act, 28 U.S.C. §§1346(b) and 2671 *et seq.*, as applicable now or hereafter amended.

- (c) **Compliance with Law**
The Private Sector Parties shall strictly comply with all applicable Federal and State laws, rules, and regulations in effect or hereafter established, including, without limitation, laws applicable to discrimination and unfair employment practices.
- (d) **Binding Arbitration Prohibited**
The State does not agree to binding arbitration by any extra-judicial body or person. Any provision to the contrary in this Agreement or incorporated herein by reference shall be null and void.
- (e) **Software Piracy Prohibition**
State or other public funds payable under this Agreement shall not be used for the acquisition, operation, or maintenance of computer software in violation of federal copyright laws or applicable licensing restrictions. Each of the Private Sector Parties hereby certifies and warrants that, during the term of this Agreement and any extensions, such Private Sector Party has and shall maintain in place appropriate systems and controls to prevent such improper use of public funds. If the State determines that a Private Sector Party is in violation of this provision, the State may exercise any remedy available at law or in equity or under this Agreement, including, without limitation, termination of this Agreement, as well as any remedy consistent with Federal copyright laws or applicable licensing restrictions.
- (f) **Employee Financial Interest / Conflict of Interest**
The signatories aver that, to their knowledge, no employee of the State has any personal or beneficial interest whatsoever in the service or property described in this Agreement. Neither Private Sector Party has any interest and shall acquire any interest, direct or indirect, that would conflict in any manner or degree with the performance of such Private Sector Party's services and no Private Sector Party shall employ any person having such known interests.
- (g) **Vendor Offset (C.R.S. §§24-30-202 (1) and 24-30-202.4)**
Subject to C.R.S. §24-30-202.4 (3.5), the Colorado State Controller, or the Enterprises, may withhold payment under the State's vendor offset intercept system for debts owed to State agencies for:
- (i) unpaid child support debts or child support arrearages;
 - (ii) unpaid balances of tax, accrued interest, or other charges specified in C.R.S. §39-21-101, *et seq.*;
 - (iii) unpaid loans due to the Student Loan Division of the Department of Higher Education;
 - (iv) amounts required to be paid to the Unemployment Compensation Fund pursuant to Article 70-82 of Title 8 of the C.R.S.; and
 - (v) other unpaid debts owing to the State as a result of final agency determination or judicial action.
- (h) **Public Contracts for Services**
Each Private Sector Party certifies, warrants, and agrees that it does not knowingly employ or contract with an illegal alien who will perform work under this Agreement and will confirm the employment eligibility of all employees who are newly hired for employment in the United States to perform work under this Agreement, through participation in the E-Verify Program or the CDOT program established pursuant to C.R.S. §8-17.5-102(5)(c). Neither Private Sector Party shall knowingly employ or contract with an illegal alien to perform work under this Agreement or enter into a contract with a subcontractor that fails to certify to such Private Sector Party that the subcontractor shall

not knowingly employ or contract with an illegal alien to perform work under this Agreement. Each Private Sector Party:

- (i) shall not use E-Verify Program or CDOT program procedures to undertake pre-employment screening of job applicants while this Agreement is being performed;
- (ii) shall notify the subcontractor and the contracting State agency within three Calendar Days if such Private Sector Party has actual knowledge that a subcontractor is employing or contracting with an illegal alien for work under this Agreement;
- (iii) shall terminate the subcontract if a subcontractor does not stop employing or contracting with the illegal alien within three Calendar Days of receiving the notice; and
- (iv) shall comply with reasonable requests made in the course of an investigation, undertaken pursuant to C.R.S. § 8-17.5-102(5), by the Colorado Department of Labor and Employment.

If a Private Sector Party participates in the CDOT program, such Private Sector Party shall deliver to the contracting State agency, institution of higher education or political subdivision a written, notarized affirmation, affirming that such Private Sector Party has examined the legal work status of such employee, and shall comply with all of the other requirements of the CDOT program. If a Private Sector Party fails to comply with any requirement of this provision or C.R.S. § 8-17.5-101, *et seq.*, the contracting State agency may terminate this Agreement for breach and, if so terminated, such Private Sector Party shall be liable for damages.

[remainder of page left intentionally blank; signature page follows]

[To insert signature blocks.]

Annex A
List of Financing Documents

A. Financing Agreements

1. *[Insert list at Financial Close]*

B. Security Documents

1. *[Insert list at Financial Close]*

Exhibit A
Form of Step-in Entity Accession Agreement

[on Step-in Entity letterhead]

[Date]

**To: Colorado High Performance Transportation Enterprise
Colorado Bridge Enterprise**
Cc: []
From: [Step-in Entity]

Ladies and Gentlemen:

Reference is made to: (a) the Project Agreement for the Central 70 Project dated as of [] (as the same may be amended, modified or supplemented from time to time in accordance with its terms, the "Project Agreement") among the Colorado High Performance Transportation Enterprise and Colorado Bridge Enterprise (together, the "Enterprises") and [] (the "Developer"); and (b) the Direct Agreement dated as of [] (as the same may be amended, modified or supplemented from time to time in accordance with its terms, the "Direct Agreement"), among the Enterprises, Developer and [] as Collateral Agent (as defined therein).

Capitalized terms used but not defined in this Step-in Entity Accession Agreement shall have the meanings given to them in in the Direct Agreement.

1. We hereby confirm that: (a) we are a Step-in Entity pursuant to Section 5 of the Direct Agreement; and (b) this is a Step-in Entity Accession Agreement for purposes of the Direct Agreement.
2. We acknowledge and agree that, upon and by reason of our execution of this Step-in Entity Accession Agreement, we shall become a party as a Step-in Entity to the Project Agreement and the Direct Agreement jointly and severally with Developer and, accordingly, shall have the rights and powers and assume the obligations of Developer under the Project Agreement and the Direct Agreement in accordance with the terms of the Direct Agreement.
3. Our notice address and contact details for purposes of Section 15.5 of the Direct Agreement are as follows:

[Step-in Entity name]

Attention: []

[Address]

Phone: []

Email: []

4. Colorado law, and rules and regulations issued pursuant thereto, shall be applied in the interpretation, execution, and enforcement of this Step-in Entity Accession Agreement. Any provision included or incorporated herein by reference which conflicts with said laws, rules, and regulations shall be null and void. Any provision incorporated herein by reference which purports to negate this provision in whole or in part shall not be valid or enforceable or available in any action at law, whether by way of complaint, defense, or otherwise. Any provision rendered null and void by the operation of this provision shall not invalidate the remainder of this Step-in Entity Accession Agreement, to the extent capable of execution.
5. All suits or actions related to this Step-in Entity Accession Agreement shall be filed and proceedings held in the State and exclusive venue shall be in State or Federal court in the City of Denver, and the Step-in Entity named below irrevocably waives:
 - (a) any objection which it may have at any time to the laying of venue of any such suit, action or proceeding brought in any such court;

- (b) any claim that any such suit, action or proceeding has been brought in an inconvenient forum; and
- (c) the right to object that such court does not have any jurisdiction with respect to such suit, action or proceeding.

The terms set out herein are hereby agreed to:

[To insert signature block for Step-in Entity.]

Exhibit B
Form of Substitute Accession Agreement

[on Substitute letterhead]

[Date]

To: Colorado High Performance Transportation Enterprise
Colorado Bridge Enterprise
Cc: []
From: [Substitute]

Ladies and Gentlemen:

Reference is made to: (a) the Project Agreement for the Central 70 Project dated as of [] (as the same may be amended, modified or supplemented from time to time in accordance with its terms, the "Project Agreement") among the Colorado High Performance Transportation Enterprise and Colorado Bridge Enterprise (together, the "Enterprises") and [] (the "Developer"); and (b) the Direct Agreement dated as of [] (as the same may be amended, modified or supplemented from time to time in accordance with its terms, the "Direct Agreement"), among the Enterprises, Developer and [] as Collateral Agent (as defined therein).

Capitalized terms used but not defined in this Substitute Accession Agreement shall have the meanings given to them in in the Direct Agreement.

1. We hereby confirm that: (a) we are a Substitute pursuant to Sections 6 and 7 of the Direct Agreement; and (b) this is a Substitute Accession Agreement for purposes of the Direct Agreement.
2. We acknowledge and agree that, pursuant to Section 7.1 of the Direct Agreement, we shall become a party as a Substitute to the Project Agreement and the Direct Agreement on and from the earlier of the date on which the Colorado State Controller countersigns this Substitute Accession Agreement and the date on which this Substitute Accession Agreement is otherwise deemed to be effective pursuant to Section 7.1 of the Direct Agreement and, accordingly, shall have the rights and powers and assume the obligations of Developer under the Project Agreement and the Direct Agreement in accordance with the terms of the Direct Agreement.
3. We hereby represent and warrant to the Enterprises that each representation and warranty made by Developer set out in Part 1 of Schedule 2 (*Representations and Warranties*) to the Project Agreement is true and correct as of the date hereof, except that, for such purposes, each reference to "Developer" shall be deemed to be a reference to us in our capacity as Substitute.
4. Our notice address and contact details for purposes of Section 15.5 of the Direct Agreement as follows:

[Substitute name]

Attention: []

[Address]

Phone: []

Email: []

5. Colorado law, and rules and regulations issued pursuant thereto, shall be applied in the interpretation, execution, and enforcement of this Substitute Accession Agreement. Any provision included or incorporated herein by reference which conflicts with said laws, rules, and regulations shall be null and void. Any provision incorporated herein by reference which purports to negate this provision in whole or in part shall not be valid or enforceable or available in any action at law, whether by way of complaint, defense, or otherwise. Any provision rendered null and void by the operation of this provision shall not invalidate the remainder of this Substitute Accession Agreement, to the extent capable of execution.

6. All suits or actions related to this Substitute Accession Agreement shall be filed and proceedings held in the State and exclusive venue shall be in State or Federal court in the City of Denver, and each party hereto irrevocably waives:
- (a) any objection which it may have at any time to the laying of venue of any such suit, action or proceeding brought in any such court;
 - (b) any claim that any such suit, action or proceeding has been brought in an inconvenient forum; and
 - (c) the right to object that such court does not have any jurisdiction with respect to such suit, action or proceeding.

The terms set out herein are hereby agreed to:

[To insert signature block for Substitute.]

Agreed for and on behalf of:

[To insert signature blocks for BE, HPTE and State Controller.]

Part B: Form of Principal Subcontractor Direct Agreement

This [Construction / O&M]⁹ Contractor Direct Agreement (this "Agreement") is dated as of [] and made among:

- (1) Colorado High Performance Transportation Enterprise ("HPTE"), a government-owned business within, and a division of, the Colorado Department of Transportation ("CDOT");
- (2) Colorado Bridge Enterprise, a government-owned business within CDOT ("BE" and, together with HPTE, each individually an "Enterprise" and, together, the "Enterprises");
- (3) [], a [describe type of legal entity and reference state of incorporation/organization] ("Developer");
- (4) [], a [describe type of legal entity and reference state of incorporation/organization] ("Principal Subcontractor"); [and]
- (5) [[], a [describe type of legal entity and reference state of incorporation/organization] and [], a [describe type of legal entity and reference state of incorporation/organization] ("Guarantors")]¹⁰.

RECITALS

Whereas:

- (A) The Enterprises and Developer have entered into a Project Agreement for the Central 70 Project dated as of [] (as the same may be amended, modified or supplemented from time to time in accordance with its terms, the "Project Agreement"), in connection with the design, construction, financing, operation and maintenance of a portion of the I-70 East corridor in Greater Denver, Colorado (the "Project") as more fully described in the Project Agreement.
- (B) The Principal Subcontractor, Developer [and the Guarantors] have entered into a [Construction / O&M] Contract for the Project dated as of [] (as the same may be amended, modified or supplemented from time to time in accordance with its terms, the "Principal Subcontract"), in connection with the [design and construction / operation and maintenance] of the Project as more fully described in the Principal Subcontract.¹¹
- (C) [The Guarantors have provided to Developer a [payment and performance] guaranty dated as of [] (as the same may be amended, modified or supplemented from time to time in accordance with its terms, the "Guaranty") of the Principal Subcontractor's obligations under the Principal Contract.]
- (D) It is a condition precedent to Financial Close under Schedule 1 (*Financial Close*) to the Project Agreement that the parties hereto execute this Agreement.

Now, therefore, in consideration of their mutual undertakings and agreements hereunder, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties undertake and agree as follows:

1. DEFINITIONS, INTERPRETATION AND RELATIONSHIP TO PROJECT AGREEMENT

1.1 Definitions

- (a) Capitalized terms used but not defined in this Agreement shall have the meanings given to them in Part A of Annex A (*Definitions and Abbreviations*) of the Project Agreement.
- (b) Except as otherwise specified herein, or as the context may otherwise require, the following terms have the respective meanings set out below for all purposes of this Agreement:

⁹ Form to be modified throughout where indicated to reflect execution by the Construction Contractor or the O&M Contractor. If necessary (depending on Developer's approach to Subcontracting the Work), refer to another type of Principal Subcontractor.

¹⁰ To be modified as necessary to reflect the inclusion or absence of a Guarantor.

¹¹ To be modified as necessary to reflect any Guaranty arrangements.

<u>“Enterprise Step-in”</u>	has the meaning given to it in <u>Section 2.2(c)(iii)</u> of this Agreement.
<u>“Enterprise Step-in Rights Period”</u>	has the meaning given to it in <u>Section 2.2(c)</u> of this Agreement.
[<u>“Guaranty”</u>]	[has the meaning given to it in the Recitals.]
<u>“Principal Subcontract”</u>	has the meaning given to it in the Recitals.
<u>“Private Sector Parties”</u>	means Developer[,] [and] the Principal Subcontractor [and the Guarantors].
<u>“Subcontractor Bond”</u>	means any Contractor Bond provided by the Principal Subcontractor in favor of Developer in accordance with Section 9.3.2.b. of the Project Agreement.
<u>“Subordination Date”</u>	means the date on which all of the right, title and interest of the Collateral Agent (and each Lender) against the Principal Subcontractor[, the Guarantors] and the provider of the Subcontractor Bond becomes subject and subordinated in all respects to the right, title and interest of the Enterprises pursuant to this Agreement in accordance with Section 12.2 of the Lenders Direct Agreement.

1.2 Interpretation

- (a) Headings and other internal references
- (i) Headings are inserted for convenience only and shall not affect interpretation of this Agreement.
 - (ii) Except as the context may otherwise provide, the words “herein”, “hereof” and “hereunder”, and words of similar import, shall be construed to refer to this Agreement in its entirety and not to any particular provision of it.
 - (iii) Except as otherwise expressly provided or as the context may otherwise provide, a reference to any Section within this Agreement is a reference to such Section of this Agreement.
- (b) Common terms and references
- (i) The singular includes the plural and vice versa.
 - (ii) Words preceding “include”, “includes”, “including” and “included” shall be construed without limitation by the words that follow.
 - (iii) The word “promptly” means as soon as reasonably practicable in light of then-prevailing circumstances.
- (c) References to agreements, documents and Persons
- Except as otherwise expressly provided in this Agreement, a reference:
- (i) to an agreement or other document shall be construed to be a reference to such agreement or other document (including any schedules, annexes or exhibits thereto) as it may be amended, modified or supplemented from time to time in accordance with its terms;
 - (ii) to a Person includes such Person’s permitted successors, assigns and transferees; and
 - (iii) where the Principal Subcontractor is at any time a consortium, partnership, joint venture or any other unincorporated grouping acting together for a common

purpose, to the "Principal Subcontractor" shall be deemed to include reference to each and every member or partner of the same and the liability of each and every such member or partner under this Agreement shall be deemed to be joint and several.

(d) Discretion

Except as otherwise expressly provided in this Agreement, where this Agreement provides that any consent, approval or like assent is to be made or given in the "discretion" of a Person, it shall be made or given only in the sole and absolute discretion of such Person (which discretion includes the ability to refrain from giving, or to impose conditions on, such consent, approval or like assent), which discretionary decision regarding any consent, approval or like assent shall be final and binding and not subject to dispute other than with respect to:

- (i) a good faith dispute concerning whether the consent, approval or like assent was discretionary; or
- (ii) a breach of the implied covenant of good faith and fair dealing.

1.3 Relationship to Project Agreement

- (a) In the event of any conflict, ambiguity or inconsistency between the provisions of (i) [either][any of] the Project Agreement[, the Guaranty] or the Principal Subcontract and (ii) the provisions of this Agreement, the provisions of this Agreement shall prevail.
- (b) Notwithstanding the foregoing, nothing in this Agreement amends or modifies (i) any of Developer's obligations under the Project Agreement, (ii) any of the Principal Subcontractor's obligations under the Principal Subcontract [or (iii) any of the Guarantor's obligations under the Guaranty].

2. UNDERTAKINGS

2.1 Performance Standards

- (a) The Principal Subcontractor [represents and warrants to the Enterprises that it has performed, and]¹² hereby undertakes to perform[,] such portion of the Work that is the subject of the Principal Subcontract pursuant to and in compliance with the terms, conditions and requirements of:
 - (i) the Principal Subcontract; and
 - (ii) the Project Agreement, to the extent applicable in accordance with its terms or the terms of the Principal Subcontract,

provided that, without prejudice to Section 12.2(c) of the Lenders Direct Agreement, the Enterprises shall not be entitled to exercise against the Principal Subcontractor any rights or remedies to which they become entitled as a result of a breach of any of [the representations and warranties or] undertakings made pursuant to this Section 2.1(a) until the earliest of:

- (iii) the Subordination Date; and
 - (iv) following the release in writing of all right, title and interest of the Collateral Agent (and each Lender) against the Principal Subcontractor[, the Guarantors] and the provider of the Subcontractor Bond, the occurrence of [the Expiry Date (or, if earlier, the Termination Date)]¹³ [the Termination Date].¹⁴
- (b) The Enterprises agree that the Principal Subcontractor [and the Guarantors] shall:

¹² Delete representations and warranties if any Principal Subcontractor Direct Agreement is delivered simultaneously with the execution of the relevant Principal Subcontract.

¹³ Delete with respect to the Construction Contract.

¹⁴ Delete with respect to the O&M Contract.

- (i) be entitled in any action or proceedings by the Enterprises in connection with, or as a result of having exercised their rights pursuant to, this Agreement to raise equivalent rights of defense of liability (except for set off or counterclaim) as [it / they] would have against Developer under[, respectively,] the Principal Subcontract [and the Guarantee]; and
- (ii) have no liability under, or as a result of the Enterprises exercising their rights pursuant to, this Agreement that is of greater severity or of longer duration than [it / they] would have had if the Enterprises had been[, respectively,] a party to the Principal Subcontract as joint employer together with Developer [and a joint beneficiary of the Guaranty together with Developer].

2.2 Step-in Rights

- (a) The Principal Subcontractor shall not exercise, or seek to exercise, any right which may be or becomes available to it to:
 - (i) terminate, or treat as terminated or repudiated, the Principal Subcontract or its engagement thereunder; or
 - (ii) discontinue or suspend the performance of any of its obligations under the Principal Subcontract,

without first giving to the Enterprises at least 60 Calendar Days' (or, in the case of a payment default, 45 Calendar Days') prior notice in accordance with Section 2.2(b), provided that, if the expiry period of such notice occurs prior to the expiry of the Enterprise Step-in Rights Period, the Principal Subcontractor shall not be entitled to exercise, or seek to exercise, its relevant right(s) unless and until:
 - (iii) the Enterprises deliver a notice to the Principal Contractor pursuant to Section 2.2(c) during the Enterprise Step-in Rights Period initiating an Enterprise Step-in and subsequently fail to remedy the circumstances that gave rise to the delivery of the notice from the Principal Subcontractor by the date which is 30 Calendar Days after the specified date referred to in Section 2.2(c)(iii); or
 - (iv) the Enterprise Step-in Rights Period has expired without the Enterprises having given any notice to the Principal Contractor pursuant to Section 2.2(c).
- (b) Any notice given by the Principal Subcontractor to the Enterprises pursuant to Section 2.2(a) shall specify:
 - (i) the potential grounds for the Principal Subcontractor to exercise any right described in Sections 2.2(a)(i) or 2.2(a)(ii), together with details regarding any other unperformed obligations of, and uncured breaches by, Developer under the Principal Subcontract of which the Principal Subcontractor is aware;
 - (ii) all amounts due and payable by Developer to the Principal Subcontractor under the Principal Subcontract, if any, on or before the date of such notice and which remain unpaid at such date, and the nature of Developer's obligation to pay such amounts; and
 - (iii) the amount of any payments that the Principal Subcontractor reasonably foresees shall become due and payable from Developer to the Principal Subcontractor under the Principal Subcontract prior to the expiry of the Enterprise Step-in Rights Period.
- (c) At any time during the period:
 - (i) on and from the earlier of:
 - (A) the date of the Enterprises' receipt of a notice (if any) from the Principal Subcontractor pursuant to Section 2.2(a); and
 - (B) the Subordination Date;

- (ii) to and including the later of:
 - (A) the 60th Calendar Day (or, in the case of a payment default, the 45th Calendar Day) after the Enterprises' receipt of a notice (if any) from the Principal Subcontractor pursuant to Section 2.2(a); and
 - (B) the 30th Calendar Day after the date of receipt by the Enterprises of a notice from the Collateral Agent delivered pursuant to Section 12.2(a) of the Lenders Direct Agreement,(the "Enterprise Step-in Rights Period"), the Enterprises shall give notice to the Principal Subcontractor [and the Guarantors] as to whether the Enterprises (or their designee):
 - (iii) shall from the date specified in such notice (which specified date shall be no later than the last Calendar Day of such Enterprise Step-in Rights Period) assume all rights and obligations of, and succeed to the interests of, Developer under the Principal Subcontract[, the Guaranty] and any Subcontractor Bond to the exclusion and in place of Developer (an "Enterprise Step-in"), provided that, following any such assumption and succession, each of the Principal Subcontract [and the Guaranty] and any Subcontractor Bond shall remain in full force and effect; or
 - (iv) waive their rights to effect an Enterprise Step-in pursuant to Section 2.2(c)(iii).(d) [Each of] the Principal Subcontractor [and the Guarantors] acknowledges and agrees that the Enterprises, in their discretion, shall have the right to require [it] [them]:
 - (i) following the occurrence of both:
 - (A) the release in writing of all right, title and interest of the Collateral Agent (and each Lender) against the Principal Subcontractor[, the Guarantors] and the provider of the Subcontractor Bond; and
 - (B) [the Expiry Date (or, if earlier, the Termination Date)]¹⁵ [the Termination Date],¹⁶to consent to any assignment and transfer of the benefit of this Agreement[, the Guaranty] and the Principal Subcontract (including the benefit of all warranties and guarantees, express or implied, provided under the Principal Subcontract) pursuant to Section 34.2.1 of the Project Agreement;
 - (ii) to enter into a novation agreement to effect any Enterprise Step-in or any assignment and transfer referred to in Section 2.2(d)(i); and
 - (iii) to cause the issuer of any Subcontractor Bond to enter into such agreements or other documents as reasonably necessary to grant the Enterprises the benefits previously available to Developer under such Subcontractor Bond following any Enterprise Step-in or any assignment and transfer referred to in Section 2.2(d)(i).(e) [Each of] the Principal Subcontractor [and the Guarantors] acknowledges and agrees [it] [they] shall not take any action (or refrain from taking any action) in a manner that is calculated or intended to directly or indirectly prejudice or frustrate any of the activities contemplated under Section 34.1 of the Project Agreement or any transfer or assignment contemplated under Section 34.2 of the Project Agreement and this Section 2.2(d).
- (f) If an Enterprise Step-in occurs, the Enterprises shall accept liability for Developer's obligations under the Principal Subcontract and shall as soon as practicable thereafter cure any outstanding breach by Developer which is capable of cure by Enterprises, in each case subject to Developer's rights under the terms of the Principal Subcontract.

¹⁵ Delete with respect to the Construction Contract.

¹⁶ Delete with respect to the O&M Contract.

- (g) For certainty, the Enterprises shall not be under any obligation to the Principal Subcontractor, nor shall the Principal Subcontractor have any claim or cause of action against the Enterprises, unless and until an Enterprise Step-in occurs.
- (h) Developer acknowledges and agrees that the Principal Subcontractor [and the Guarantors] shall [each] be entitled to rely on any notice or instruction given to it by the Enterprises' exercising their Enterprise Step-in rights under this Agreement as conclusive evidence that the Enterprises are entitled to exercise such rights.

3. ENTERPRISES' REMEDIES

The rights and benefits conferred upon the Enterprises by this Agreement are in addition to: (a) any other rights and remedies they may have against Developer, the Principal Subcontractor [and/or the Guarantors]; and (b) any other rights and benefits they may have with respect to any Subcontractor Bond or any other Contractor Bond.

4. CHOICE OF LAW; JURISDICTION AND VENUE; DISPUTE RESOLUTION

4.1 Choice of Law

Colorado law, and rules and regulations issued pursuant thereto, shall be applied in the interpretation, execution, and enforcement of this Agreement. Any provision included or incorporated herein by reference which conflicts with said laws, rules, and regulations shall be null and void. Any provision incorporated herein by reference which purports to negate this provision or any other Special Provision set out in Section 5.12 in whole or in part shall not be valid or enforceable or available in any action at law, whether by way of complaint, defense, or otherwise. Any provision rendered null and void by the operation of this provision shall not invalidate the remainder of this Agreement, to the extent capable of execution.

4.2 Jurisdiction and Venue

All suits or actions related to this Agreement shall be filed and proceedings held in the State and exclusive venue shall be in State or Federal court in the City of Denver, and each party hereto irrevocably waives:

- (a) any objection which it may have at any time to the laying of venue of any such suit, action or proceeding brought in any such court;
- (b) any claim that any such suit, action or proceeding has been brought in an inconvenient forum; and
- (c) the right to object that such court does not have any jurisdiction with respect to such suit, action or proceeding.

5. GENERAL PROVISIONS

5.1 Amendments and Waivers

- (a) This Agreement may only be amended by a written amendment duly executed by all parties together with, to the extent required by Law, the Colorado State Controller or its designee, unless the amendment to this Agreement is expressly allowed or required to be made in any other manner pursuant to this Agreement and Law.
- (b) Except to the extent otherwise expressly provided in this Agreement:
 - (i) any waiver of, or consent to any departure from, the requirements of any provision of this Agreement shall be approved (in the discretion) of the party giving it and shall be effective only if it is in writing by such party, and only in the specific instance, for the specific time, subject to the specific conditions and for the specific purpose for which it has been given;
 - (ii) no failure on the part of any party to exercise, and no delay in exercising, any right or power under this Agreement shall operate as a waiver of such right or power; and

- (iii) no single or partial exercise of any right or power under this Agreement, including any right to give or withhold any consent or approval, nor any abandonment or discontinuance of steps to enforce such a right or power, shall preclude or render unnecessary any other or further exercise of such right or the exercise of any other right.

5.2 Successors and Assigns

- (a) No party to this Agreement may assign or transfer any part of its rights or obligations hereunder without the prior written consent of the other parties.
- (b) This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and permitted assigns.

5.3 Severability

- (a) If any provision (or part of any provision) of this Agreement is ruled invalid by a court having proper jurisdiction, then the parties shall:
 - (i) promptly meet and negotiate a substitute for such provision or part thereof which shall, to the greatest extent legally permissible, effect the original intent of the parties; and
 - (ii) if necessary or desirable, and to the extent the parties agree to do so, apply to the court which declared such invalidity for an interpretation of the invalidated provision (or part thereof) to guide the negotiations.
- (b) If any provision (or part of any provision) of this Agreement shall, for any reason, be held to be invalid, illegal, or unenforceable in any respect, such provision (or part thereof) shall not affect the validity, legality and enforceability of any other provision of (or the other part of such provision) or any other documents referred to in this Agreement, and this Agreement shall be construed as if such invalid, illegal, or unenforceable provision (or part thereof) had never been contained herein.

5.4 Entire Agreement

Subject to Section 1.3(b), this Agreement constitutes the entire agreement among the parties hereto concerning the subject matter hereof and supersedes all prior negotiations, representations, and agreements, either oral or written, among the parties with respect to their subject matter.

5.5 Notices and Communications

- (a) Any notice shall be given in writing by means of physical (including delivery by courier and postage pre-paid certified or registered mail), digital or electronic communication, but excluding the use of social media, messengering, broadcast and equivalent services, to the relevant party at the following addresses, as applicable:

<u>Developer</u>	<u>Enterprises</u>	<u>Principal Subcontractor</u>	<u>Guarantor</u>	<u>Colorado State Controller</u>
Attention: []	Attention: []	Attention: []	Attention: []	Attention: []
[Address]	[Address]	[Address]	[Address]	[Address]
Phone: []	Phone: []	Phone: []	Phone: []	Phone: []
Email: []	Email: []	Email: []	Email: []	Email: []

- (b) A notice shall be deemed to have been delivered and received:
 - (i) upon receipt (confirmed by automatic answer back, read receipt or equivalent evidence of receipt), if validly transmitted by digital or electronic distribution before 3:00 p.m. (local time at the place of receipt) on a Working Day;
 - (ii) on the next Working Day following receipt (confirmed by automatic answer back, read receipt or equivalent evidence of receipt), if validly transmitted by digital or

electronic distribution on or after 3:00 p.m. (local time at the place of receipt) on a Working Day;

- (iii) upon receipt, if physically delivered in person; or
- (iv) if delivered by courier or postage pre-paid certified or registered mail, on the date of receipt as shown by the addressee's registry or certification receipt or on the date receipt at the appropriate address is refused, as shown on the records or manifest of the United States Postal Service or independent courier.

- (c) The parties shall notify each other in writing of any change of address and/or contact information, such notification to become effective five Working Days after notification.

5.6 Counterparts

This Agreement (or an amendment or waiver in respect to this Agreement) may be executed in one or more counterparts (including by electronic signature and/or scanned or digital transmission). Any single counterpart or a set of counterparts executed, in either case, by each of the parties and, to the extent required by Law, the Colorado State Controller or its designee, shall constitute a full and original instrument for all purposes.

5.7 No Third Party Beneficiaries

It is not intended by any of the provisions of this Agreement to create any third party beneficiary rights hereunder. Notwithstanding the foregoing, the duties, obligations and responsibilities of the parties with respect to third parties shall remain as imposed by Law.

5.8 No Partnership

Nothing in this Agreement is intended or shall be construed to create any partnership, joint venture or similar relationship or among the parties. None of the parties shall hold itself out contrary to the terms of this Section 5.8.

5.9 No Interference

Developer joins in this Agreement to acknowledge and consent to the arrangements set out and agrees not to knowingly do or omit to do anything that may prevent any party from enforcing its rights under this Agreement. For certainty, Developer has no right to enforce any provision of this Agreement.

5.10 No Personal Liability

Each Enterprise's authorized representatives, including the Enterprise Representative, are acting solely as agents and representatives of the Enterprises when carrying out the provisions of or exercising the power or authority granted to them under this Agreement, and, as such, none of them shall not be liable either personally or as employees of the Enterprises for actions in their ordinary course of employment.

5.11 Costs and Expenses of the Parties

Except as otherwise expressly provided in this Agreement, the Project Agreement, the Principal Subcontract [or the Guaranty], each party shall bear its own costs and expenses (including legal and other advisers' fees and expenses) in connection with the preparation, negotiation, execution and performance of this Agreement and all other related agreements.

5.12 Special Provisions¹⁷

- (a) **Controller's Approval**

This Agreement shall not be valid until it has been approved by the Colorado State Controller or its designee.
- (b) **Governmental Immunity**

No term or condition of this Agreement shall be construed or interpreted as a waiver, express or implied, of any of the immunities, rights, benefits, protections, or other provisions, of the Colorado Governmental Immunity Act, C.R.S. §§24-10-101 *et seq.*, or the Federal Tort Claims Act, 28 U.S.C. §§1346(b) and 2671 *et seq.*, as applicable now or hereafter amended.
- (c) **Compliance with Law**

The Private Sector Parties shall strictly comply with all applicable Federal and State laws, rules, and regulations in effect or hereafter established, including, without limitation, laws applicable to discrimination and unfair employment practices.
- (d) **Binding Arbitration Prohibited**

The State does not agree to binding arbitration by any extra-judicial body or person. Any provision to the contrary in this Agreement or incorporated herein by reference shall be null and void.
- (e) **Software Piracy Prohibition**

State or other public funds payable under this Agreement shall not be used for the acquisition, operation, or maintenance of computer software in violation of federal copyright laws or applicable licensing restrictions. Each of the Private Sector Parties hereby certifies and warrants that, during the term of this Agreement and any extensions, such Private Sector Party has and shall maintain in place appropriate systems and controls to prevent such improper use of public funds. If the State determines that a Private Sector Party is in violation of this provision, the State may exercise any remedy available at law or in equity or under this Agreement, including, without limitation, termination of this Agreement, as well as any remedy consistent with Federal copyright laws or applicable licensing restrictions.
- (f) **Employee Financial Interest / Conflict of Interest**

The signatories aver that, to their knowledge, no employee of the State has any personal or beneficial interest whatsoever in the service or property described in this Agreement. Neither Private Sector Party has any interest and shall acquire any interest, direct or indirect, that would conflict in any manner or degree with the performance of such Private Sector Party's services and no Private Sector Party shall employ any person having such known interests.
- (g) **Vendor Offset (C.R.S. §§24-30-202 (1) and 24-30-202.4)**

Subject to C.R.S. §24-30-202.4 (3.5), the Colorado State Controller, or the Enterprises, may withhold payment under the State's vendor offset intercept system for debts owed to State agencies for:

 - (i) unpaid child support debts or child support arrearages;
 - (ii) unpaid balances of tax, accrued interest, or other charges specified in C.R.S. §39-21-101, *et seq.*;

¹⁷ **Note to Proposer:** The Special Provisions are included to ensure that the relevant Principal Subcontract complies with State Law upon step-in by the Enterprises.

- (iii) unpaid loans due to the Student Loan Division of the Department of Higher Education;
 - (iv) amounts required to be paid to the Unemployment Compensation Fund pursuant to Article 70-82 of Title 8 of the C.R.S.; and
 - (v) other unpaid debts owing to the State as a result of final agency determination or judicial action.
- (h) Public Contracts for Services

Each Private Sector Party certifies, warrants, and agrees that it does not knowingly employ or contract with an illegal alien who will perform work under this Agreement and will confirm the employment eligibility of all employees who are newly hired for employment in the United States to perform work under this Agreement, through participation in the E-Verify Program or the CDOT program established pursuant to C.R.S. §8-17.5-102(5)(c). None of the Private Sector Parties shall knowingly employ or contract with an illegal alien to perform work under this Agreement or enter into a contract with a subcontractor that fails to certify to such Private Sector Party that the subcontractor shall not knowingly employ or contract with an illegal alien to perform work under this Agreement. Each Private Sector Party:

- (i) shall not use E-Verify Program or CDOT program procedures to undertake pre-employment screening of job applicants while this Agreement is being performed;
- (ii) shall notify the subcontractor and the contracting State agency within three Calendar Days if such Private Sector Party has actual knowledge that a subcontractor is employing or contracting with an illegal alien for work under this Agreement;
- (iii) shall terminate the subcontract if a subcontractor does not stop employing or contracting with the illegal alien within three Calendar Days of receiving the notice; and
- (iv) shall comply with reasonable requests made in the course of an investigation, undertaken pursuant to C.R.S. § 8-17.5-102(5), by the Colorado Department of Labor and Employment.

If a Private Sector Party participates in the CDOT program, such Private Sector Party shall deliver to the contracting State agency, institution of higher education or political subdivision a written, notarized affirmation, affirming that such Private Sector Party has examined the legal work status of such employee, and shall comply with all of the other requirements of the CDOT program. If a Private Sector Party fails to comply with any requirement of this provision or C.R.S. § 8-17.5-101, *et seq.*, the contracting State agency may terminate this Agreement for breach and, if so terminated, such Private Sector Party shall be liable for damages.

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**Schedule 22
Forms of Legal Opinions**

Part A: Form of Enterprises' Legal Opinion¹

Ladies and Gentlemen:

We have served, in a limited role, as advisory counsel (but not as bond counsel or disclosure counsel) to the Colorado High Performance Transportation Enterprise ("HPTE") and the Colorado Bridge Enterprise ("BE" and, together with HPTE, the "Enterprises") in connection with the execution and delivery of the Project Agreement for the Central 70 Project (the "Project Agreement") between the Enterprises and [], a [] (the "Developer"), the other Enterprise Closing Agreements (as defined in the Project Agreement), and the Interagency Agreement between the Enterprises and the Colorado Department of Transportation for the Central 70 Project (the "IAA"). Capitalized terms used but not defined in this Opinion Letter shall have the meanings given to them in Part A of Annex A (*Definitions and Abbreviations*) of the Project Agreement.

In this connection we have examined: (1) the Project Agreement; (2) the Project Agreement Amendment; (3) the Lenders Direct Agreement; (4) each Principal Subcontractor Direct Agreement; (5) each other Enterprise Closing Agreement; and (6) the IAA. The documents referred to in (1) through (6), together, are referred to in this Opinion Letter as the "Enterprise Opinion Documents".

We have also examined originals or copies, certified or otherwise identified to our satisfaction, of such other documents, public records and other instruments and have conducted such other investigations as we have deemed necessary for the purposes of this Opinion Letter. As to questions of fact material to our Opinion Letter, we have relied upon such certified proceedings and certifications of public officials furnished to us, without undertaking to verify the same by independent investigation.

We have relied on the representations of Developer contained in the Project Agreement.

We have assumed that:

- (i) Developer has complied with all legal requirements pertaining to its status as such status relates to its right to enforce and comply with the Enterprise Opinion Documents against the Enterprises, the Lenders and any other parties thereto;
- (ii) Each Enterprise Opinion Document submitted to us for review is accurate and complete, each such document that is an original is authentic, each such document that is a copy conforms to an authentic original, and all signatures on each such document are genuine; and
- (iii) The form and content of all Enterprise Opinion Documents submitted to us as unexecuted final drafts do not differ in any respect relevant to this Opinion Letter from the form and content of such Enterprise Opinion Documents as executed and delivered.

Whenever an opinion expressed herein is stated to be to our knowledge (or other words of similar import are used), it means, without (except to the extent expressly set forth therein) investigation, analysis, or review of court or other public records or our files, or inquiry of persons, the conscious awareness of facts or other information by the lawyers within the Colorado Attorney General's Office who have had active involvement in negotiating and preparing the Enterprise Opinion Documents.

All opinions expressed herein regarding compliance with law are limited to the laws of the State of Colorado, in each case, as in effect on the date of this Opinion Letter.

¹ **Note to Proposers:** The form of legal opinion set out in this Part A remains under internal review by the Enterprises and the AG's Office and therefore is subject to amendment.

We are of the opinion that:

1. The Enterprises are both government-owned businesses within the meaning of Section 20(2)(d) of Article X of the Colorado Constitution, duly created, organized and existing under the laws of the State, and specifically Part 8 of Title 43 of the Colorado Revised Statutes.
2. The Enterprises have the legal power, right and authority to execute, deliver and perform the Enterprise Opinion Documents, subject to the terms and conditions of each such document.
3. The Enterprises have duly authorized by all necessary action the execution, delivery and performance of, and have duly and validly executed and delivered, the Enterprise Opinion Documents to which each is a party.
4. The Enterprise Opinion Documents constitute legal, valid and binding obligations of the Enterprises or, in relation to any Enterprise Opinion Document to which only one of the Enterprises is a party, the relevant Enterprise enforceable against them or it, respectively, in accordance with its terms, except to the extent limited by applicable bankruptcy, insolvency, reorganization, moratorium or other similar laws affecting the enforceability of the rights of creditors generally, by general principles of equity, by the exercise by the State and its governmental bodies of the police power inherent in the sovereignty of the State and by the exercise by the United States of the powers delegated to it by the Constitution of the United States.
5. [Except as disclosed in writing by the Enterprises to Developer (a copy of which disclosure is attached to this Opinion Letter),] no action, suit, proceeding, investigation or litigation is pending or, to the best of our knowledge, overtly threatened in writing that challenges: (a) the authority of either Enterprise to execute, deliver or perform any of the Enterprise Opinion Documents; (b) the legality, validity or enforceability of any of the Enterprise Opinion Documents as against either Enterprise; or (c) the authority of any representative of either Enterprise executing any of the Enterprise Opinion Documents.
6. All required consents and approvals have been obtained with respect to the execution, delivery and performance by the Enterprises of the Enterprise Opinion Documents.
7. To the best of our knowledge, after due inquiry, the execution and delivery of the Enterprise Opinion Documents has not resulted in, and the performance thereof will not result in, a default under or violation of any other agreement to which the relevant Enterprise is a party or any judgment or decree by which the Enterprises are bound.
8. The execution and delivery by the Enterprises of the Enterprise Opinion Documents has not resulted in, and the performance thereof by the Enterprises will not result in, any violation of any Law applicable to the Enterprises; provided, however, that no opinion is given as to whether the Enterprise Opinion Documents comply with or are excepted from the provisions of Sections 24-91-101 through 24-91-110 and Sections 38-26-106 through 38-26-109 of the Colorado Revised Statutes.

FOR THE ATTORNEY GENERAL OF THE STATE OF COLORADO

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Office of the Attorney General